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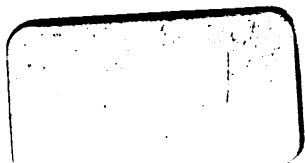
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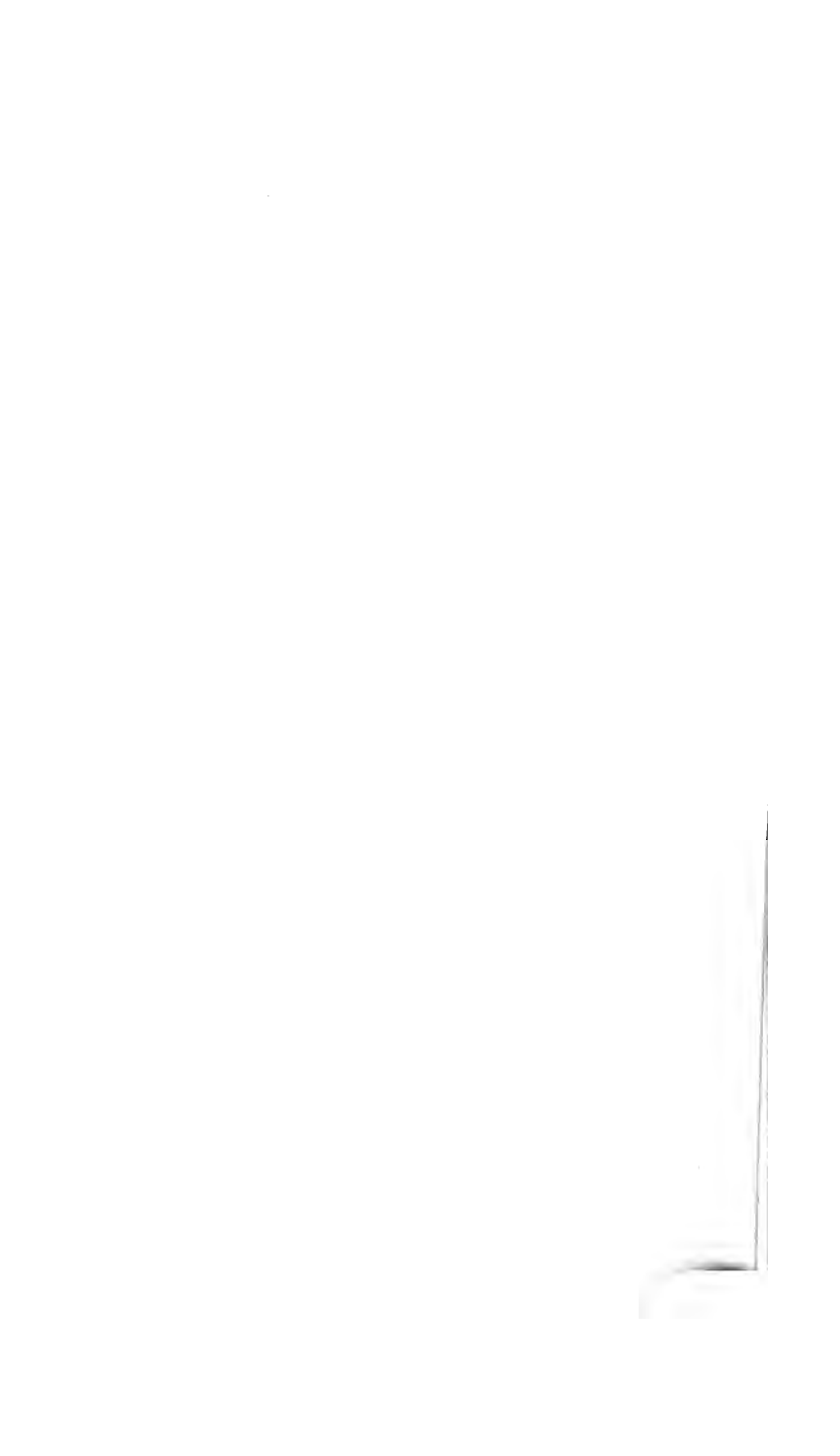
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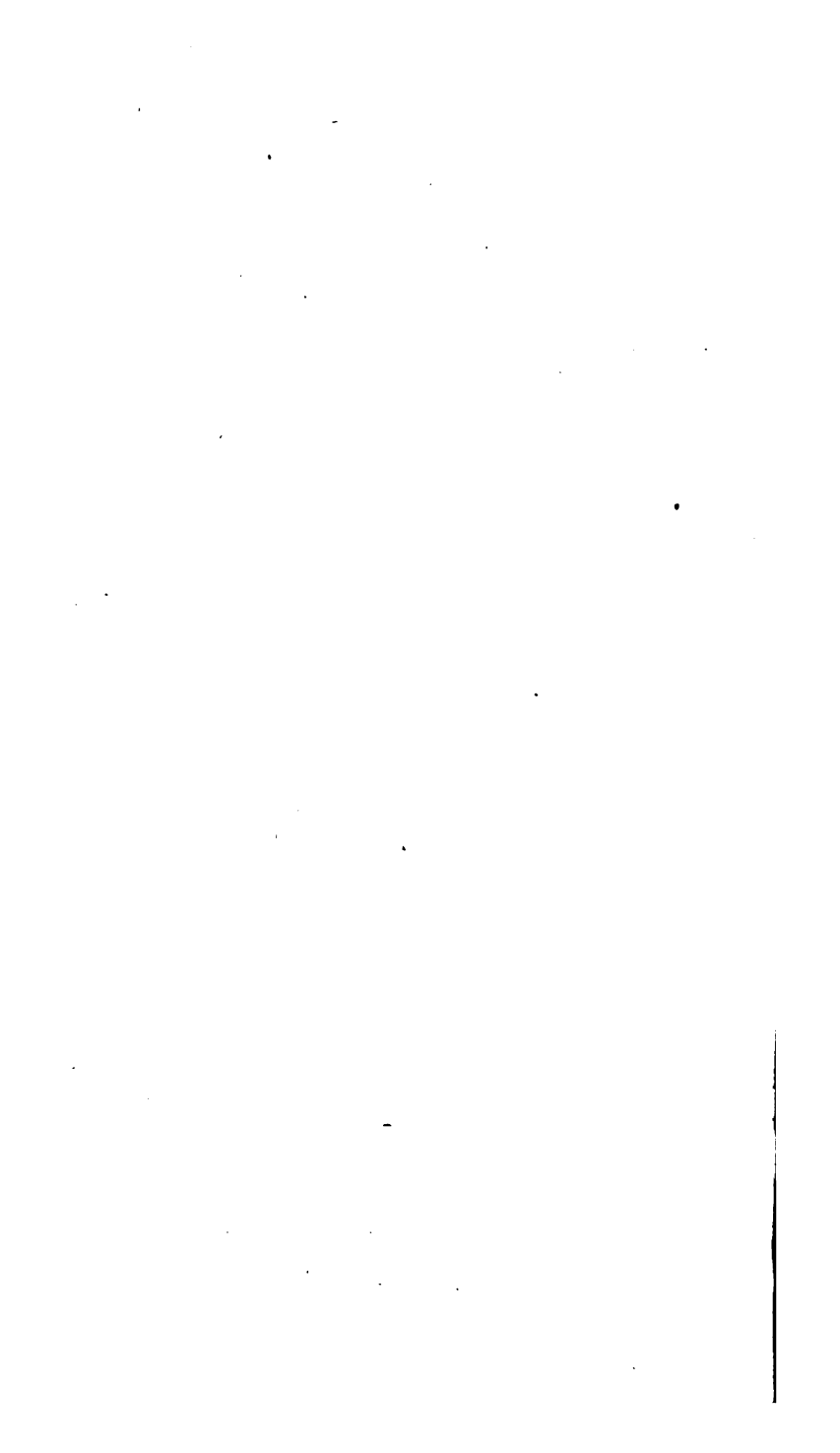
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Deeds, &c.

THE

PRACTICE

OF

CONVEYANCING.

By WILLIAM HUGHES, Esq.,

BARRISTER-AT-LAW,

AUTHOR OF "THE PRACTICE OF SALES;" "THE PRACTICE
OF MORTGAGES;" "PRECEDENTS IN MODERN
CONVEYANCING;" ETC., ETC.

VOL. I.

LAW TIMES OFFICE:

29, ESSEX STREET, STRAND, LONDON.

1856.

LONDON:
PRINTED BY JOHN CROCKFORD, 29, ESSEX STREET,
STRAND

THE
COMPLETE PRACTICE
OF THE
LAW OF ENGLAND,

AS ESTABLISHED BY THE
RECENT STATUTES, ORDERS, RULES, &c.

VOL. V.

THE
PRACTICE OF CONVEYANCING.

BY
WILLIAM HUGHES, Esq.,
BARRISTER-AT-LAW.

LONDON:
LAW TIMES OFFICE, 29, ESSEX STREET, STRAND.

1856.
DAYMAN & FISHE:
Solicitors,
Tiverton, Devon.

LONDON:
PRINTED BY JOHN CROCKFORD, 29, ESSEX STREET,
STRAND.

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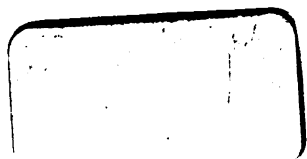
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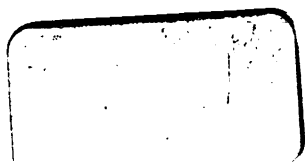
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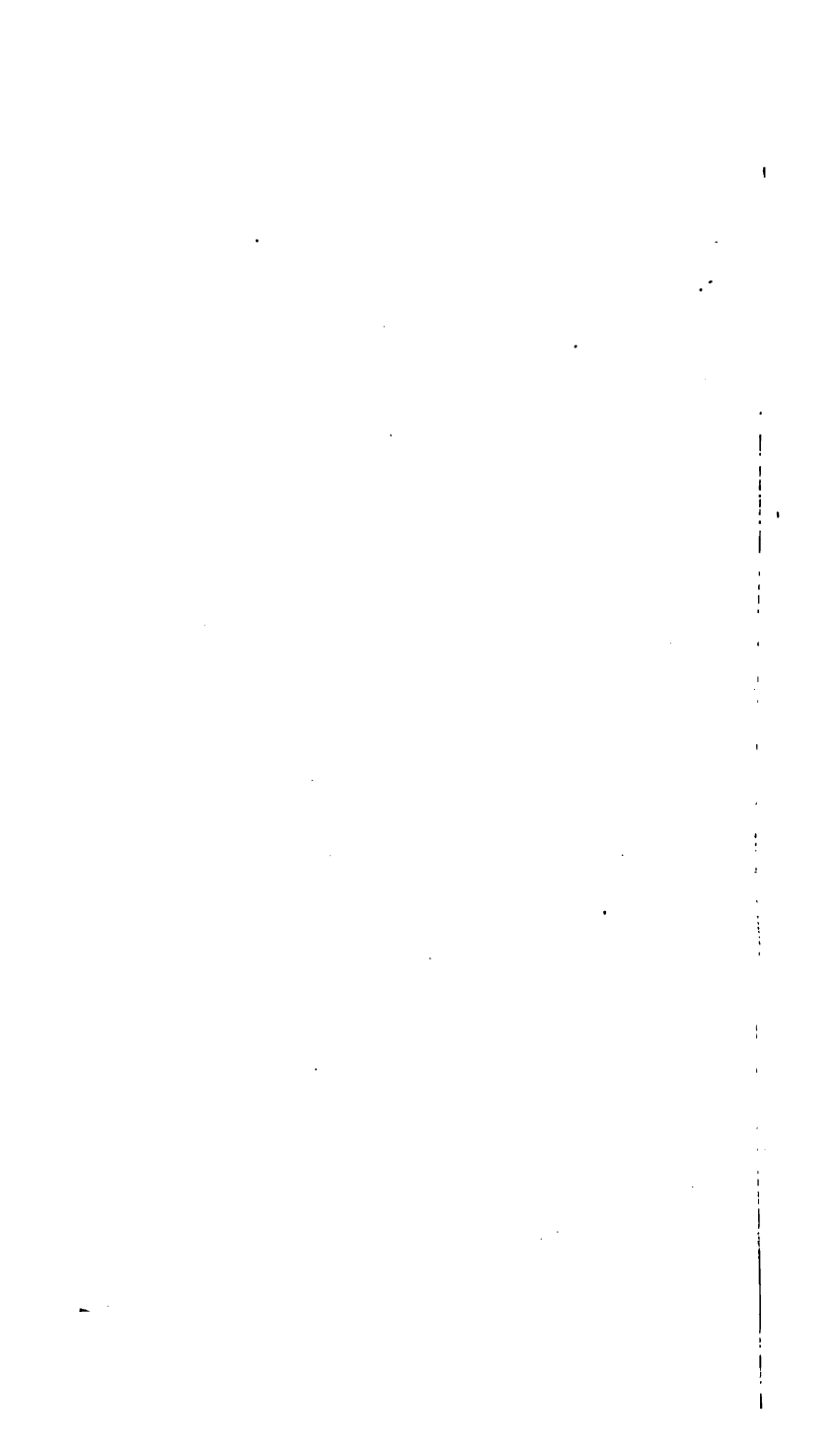
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so that the most effectual instrument may always be employed to accomplish the end for which it is designed.

And now we will proceed to point out the real object and nature of the present work, which is, to treat upon *the practice* of conveyancing, as distinct from the law itself; not to show what the law is, but how it is to be carried out in practice. This subject, which is intended to comprehend the practice of every department of conveyancing, will be treated upon under the following heads; viz., 1, Sales; 2, Securities; 3, Leases; 4, Settlements; 5, Indemnities; and 6, Wills.

The head "Sales" will embrace transactions relating to the purchase of every kind of property capable of being made the subject-matter of disposition by deed, or any other written instrument, and will point out the course of practice to be pursued by the solicitors on both sides, in the conduct of all transactions connected with it, so as to show how the business ought to be conducted through all its numerous details from the commencement to its termination. We shall commence with those preliminary measures which usually precede the contract, taking up the subject from the first communication between the solicitor and his client; showing what course a vendor's solicitor should take to ascertain the nature and value of the property, as also what mode of sale it will be most prudent to adopt before he ventures to place it in the market; and in what way he should prepare the contract and particulars and conditions of sale, and see them properly carried out; as also how the solicitor for the purchaser should act in his part of the transaction; and in what way all matters connected with these proceedings should be managed by the respective solicitors on each side, in this early stage of the proceedings.

The intermediate steps between the contract and the conveyance will be next considered, wherein directions will be given for preparing the abstract, its delivery to the purchaser's solicitor, the duties of the latter in investigating the title, the requisitions and objections, and how these should be made, as also how any correspondence or negotiation concerning them should be conducted; with practical directions relating to the evidence, and other proofs in support of the title; and also how deeds, documents, and other matters of title are to be inspected, examined, and compared with the abstracts.

The search and inquiry for judgments, and other incumbrances, the getting in of all outstanding legal estates, clearing up imperfections of title, procuring the concur-

rence of all necessary parties, and all other intermediate proceedings from the time of entering into the contract to the acceptance of the title, will be then considered. After this, directions will be given for preparing the conveyance, or such other assurances as may be necessary to vest the property, of whatever nature it may consist, either in the purchaser, or in such manner as he may think proper, and, at the same time, to show what clauses are essential, their effect and operation, and the order in which they should be inserted in the deed, with all necessary instructions for penning them.

The course to be pursued with respect to forwarding the draft for the perusal of the solicitors of the different parties connected with the transaction, and also with regard to any alterations made or objections taken, and the whole line of conduct to be adopted by either party in this important part of the business, will be next pointed out.

The forms to be observed in the execution of the deed; the payment of the purchase money; the handing over of the title deeds, and the necessary covenants for their production; and all other matters connected with the finishing and winding-up of the whole business will also be fully considered.

The steps to be taken by either vendor or purchaser for annulling, or enforcing a specific performance of the contract, and the various remedies to be resorted to in case of any breach of contract by the opposite party, will be fully entered into and discussed, and the line of practice to be followed in cases of this nature clearly pointed out.

Under the head of "Securities" will be included all such instruments of assurance as are employed as a security for the payment of a definite and certain sum of money; as Mortgages, Bonds, Redeemable Annuities, Bills of Sale, and Warrants of Attorney.

"Leases," will comprehend leases of every kind and description:—of Houses, Lands, Estates, Building Leases, Leases for the purpose of carrying on any kind of manufactory, Mining Setts, or for any other lawful object, and will embrace not only lands, but every kind of property which may be made the subject-matter of a demise.

The head of "Settlements" will take in, not only every sort of assurance within the strict acceptation of that term, as marriage and other settlements, but also declarations of trust, and trusts of every kind and description, appointments in exercise of powers, Releases, Partnership Deeds, Composition Deeds, and Assignments for the benefit of Creditors;

while, under the head of "Indemnities," will be included every species of Guarantee whatever.

The subject of "Wills" is intended to comprehend practical directions for taking instructions for preparing and drawing wills, pointing out at the same time, how those instructions are to be carried out; how the will itself should be penned; the manner in which it must be executed and attested, and all other matters connected with that important business.

The subject of the Costs for conducting all the above transactions, how they are to be made; to what amount, and by whom they are to be paid, will be fully entered into and discussed in the progress of the work, in connection with the several matters to which such costs particularly relate.

BOOK THE FIRST.

SALES.

CHAPTER I.

PROCEEDINGS PRIOR TO THE CONTRACT.

- I. INTRODUCTORY OBSERVATIONS.
- II. PRACTICAL OBSERVATIONS AS TO THE PROPRIETY OF INVESTIGATING THE VENDOR'S TITLE BEFORE OFFERING THE PROPERTY FOR SALE.
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- VI. PRACTICE AS TO THE PREPARATION OF THE PARTICULARS AND CONDITIONS WHERE THE SALE IS MADE UNDER A DECREE OR ORDER OF A COURT OF EQUITY.
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- VIII. DUTIES OF THE PURCHASER'S SOLICITOR PRIOR TO THE SALE.

I. INTRODUCTORY OBSERVATIONS.

No portion of a solicitor's practice involves more important duties and responsibilities than the conduct of a sale, whether he acts on behalf of the vendor or the purchaser.

Duties of a vendor's solicitor.]—The duties of a vendor's solicitor consist in ascertaining, first, his client's right and title to dispose of the property; the nature, extent, and value of such property, and whether there are any defects or imperfections in the title; and if so, how these defects or imperfections can be best remedied. Then comes the management of the sale; the advertising of the property; the preparation of the conditions of sale or contract; the contract itself, and the steps immediately following it, wherein may be included the preparation and delivery of the abstract to the purchaser; the answering of any objections or requisitions that may be made to the title, and the conduct of all such intermediate negotiations as take place before the title is either approved of, or rejected by the purchaser, or the contract itself is rescinded, or some steps are taken either on the one side or the other, to compel a specific performance of it. If the title is approved of, then the vendor's solicitor must see that the conveyance carries out the object of the contract; that his client receives the purchase money, and does not bind himself by any unusual covenants, or enter into any general warranty of title, or incur any liability under the purchase deed, beyond what is fairly required by the terms of the contract; all of which duties require considerable attention, whilst carelessness in the discharge of any one of them may prove of serious inconvenience, and possibly of even ruinous consequences.

Duties of the purchaser's solicitor.]—If the duties of a vendor's solicitor are important, those of the solicitor for the purchaser are no less so. The latter must not only see that the property which is the subject-matter of sale is properly conveyed to his client, but he must also ascertain that the vendor has a sufficient power of disposition over it

to enable him to confer an absolute and unimpeachable title on the purchaser, free from any drawbacks, charge, or incumbrance which may endanger the ownership, diminish the value of the property, or disturb the owner in the peaceable occupation and enjoyment of it.

Purchaser's solicitor must see that his client obtains a perfectly legal title.—Neither will it be sufficient that the title is a safe holding one, and one under which a purchaser may continue in unmolested possession of the property, without danger of eviction or disturbance from any one: for the title which a purchaser is entitled to require, and which it is the duty of his solicitor to see that he obtains, is a legal title, unburdened with charges or incumbrances, and unclogged with outstanding legal estates; such a title in fact as he may always be able to set up in his defence in an action of ejectment, or compel any future purchaser to accept.

Mischief likely to arise from carelessness in any course of the transaction.—As so much care and vigilance, therefore, are required, it necessarily follows that, if a purchaser's solicitor conducts his client's business carelessly during the course of the transaction, he may do him an infinity of mischief. Even at the very outset of the affair, by heedless management in arranging the terms of the contract, or looking in too cursory a manner through the conditions of sale, he may deprive his client of his fair right to investigate the title, which, if properly looked into, would disclose such defects that no purchaser in his senses would be induced to accept it; whilst results, equally pernicious in their consequences, may arise from omitting to carry out the terms of the contract; as where it is stipulated, that unless a purchaser shall make his objections or requisitions within some certain specified time, he shall be taken to have accepted the title unconditionally, and the time specified is permitted to pass without such objections or requisitions having been made; in which case the purchaser will not only be precluded from making them afterwards, but will have bound himself to take the title with all its defects, and may thus have a purchase forced upon him, which, instead of proving a valuable acquisition, may turn out to be so fettered with claims and drawbacks of one kind and another, as not only to deteriorate very materially from its worth, but absolutely to expose him to eviction by some claimant who can show a better title; and even where the claims are of such a nature as not to deprive the purchaser of the property outright, they may nevertheless be sufficient to

reduce the value of the purchase to a very lamentable extent, and possibly give rise to actions and suits which may eventually involve the unlucky owner in heavier expenses than the property itself is actually worth.

Evils likely to arise from a negligent investigation of the title.]—The same evils also which would arise from a purchaser being precluded from a fair investigation of the title, and the right to take any objections to it, if found defective, may also proceed from his solicitor conducting such investigation in so negligent a manner as not to discover whether or not there really are any grounds for making such objections.

Mischiefs which may be incurred from the purchaser's solicitor neglecting to search for judgments.]—And even where a title is wholly free from objection, the same mischiefs we have already mentioned may ensue to a purchaser by neglecting to search for judgments which may be entered up against the vendor, and which may amount to a much larger sum than the purchase-money; which latter incumbrances it is the business of the purchaser's solicitor to see properly discharged by the vendor, and satisfaction entered up before he allows his client to complete his purchase.

II. PRACTICAL OBSERVATIONS AS TO THE PROPRIETY OF INVESTIGATING THE VENDOR'S TITLE, AND HIS INTEREST IN THE PROPERTY BEFORE OFFERING IT FOR SALE.

First steps to be taken by vendor's solicitor in the conduct of a sale.]—We have just before mentioned that the first step a vendor's solicitor ought to take in the conduct of a sale is to ascertain his right to dispose of the property, the nature, extent, and value of such property, and whether there are any defects or imperfections in the title, and if so, how those defects and imperfections can be best cured or rectified.

First inquiries he should make of his client.]—A general outline of all these matters a solicitor can generally obtain from the client himself, and of whom he should also inquire what evidence of title he is able to procure; and whether the deeds are in his possession, or in the hands of other parties, and in the latter case whether he has any, and what means of obtaining their production.

How he should proceed where the property is already in mortgage.]—If, as often happens, the property is already in mortgage, it will be necessary to apply to the mortgagee or his solicitor for a sight of the deeds, and to be furnished with

the abstract of them, which, if not already prepared, the mortgagee's solicitor may insist on his right of preparing at the costs of the vendor, who must also defray all the expenses incurred in respect of the production and inspection of such deeds and other documents of title, which in reality the mortgagor himself has only access to by sufferance; for a mortgagee has a right, if he pleases, to refuse either to permit an inspection of the deeds or to furnish an abstract of them: (*Bycroft v. Sibel*, 20 L. T. Rep. 107; 1 Hughes Pract. Mort. 6.)

Mortgagor has no power to compel mortgagee to produce the deeds, or to furnish an abstract of them.]—The only remedy a mortgagor has in a case of this kind is to pay off the mortgage, and then call upon the mortgagee to deliver up the deeds, which the latter will be then compelled to do. If, therefore, the mortgagor has no abstract in his possession, and the mortgagee refuses to furnish him with one, he has little chance of carrying on a sale to any purpose, as no one would be willing to make an offer for the purchase of a property the owner has no means of showing a title to. All the inconveniences thus incurred might have been prevented by the foresight of inserting in the mortgage deed a clause to the effect, that in the event of any contract being entered into for the sale of the property, the mortgagee would produce the deeds, and grant extracts or abstracts of them: (see the form, Concise Precedents, vol. 2, p. 5, note A., 2nd edit.)

Grounds upon which mortgagee is justified in refusing to produce the documents of title.]—This arrangement very few mortgagees would object to, for having satisfied themselves of the goodness of the title before they advanced their money on the property, they incur no risk of exposing its weakness, which is the real and only substantial ground of a mortgagee's refusing its inspection; still, as it rarely happens that when the sale or transfer of a mortgage is actually contemplated, a mortgagee refuses to produce the deeds or furnish an abstract of them, the inconvenience which might be supposed to arise from the arbitrary exercise of his power in this respect has not been much felt in practice.

Vendor's solicitor should investigate title.]—Having procured the necessary access to the deeds, the vendor's solicitor should proceed to investigate the title as narrowly as he would do if he was working through it on behalf of a pur-

**AND PERSONAL SECURITIES, JUDGMENTS, LEGACIES,
INTERESTS IN SHIPPING; OF HOUSEHOLD FURNITURE
AND OTHER MOVABLE EFFECTS; AND ALSO OF MIXED
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The Practice OF CONVEYANCING.

INTRODUCTION.

THE practice of Conveyancing, as conducted in a solicitor's office at the present day, comprehends not only the preparation of every kind of assurance, from a simple indenture of apprenticeship to instruments of the utmost importance and most complicated nature, but includes also the management of every transaction connected with these proceedings, from the moment the relation of Solicitor and Client commences, until the whole business is brought to a final termination.

This practice forms one of the most important branches of the law, and to discharge its duties effectually calls for as great, if not a greater, versatility of talent than any other branch of the profession. A practitioner in conveyancing ought to be well read in the best ancient and modern works bearing upon the Law of Real Property; he should possess an acute understanding, quick perception, retentive memory, sound judgment, a due portion of vigilance and caution, and last but not least, active and business-like habits. Fluency of speech he does not need, but he must know how to speak about the business upon which he is engaged, and be able to keep a safeguard upon his tongue, so that nothing may slip out heedlessly which may prejudice the interests of his client; and, although it is not essential that a conveyancer should be able to make a good speech, it is absolutely necessary that he should be able to write a good letter, and express himself clearly on every subject he finds it necessary to write upon.

All the above-named qualifications, numerous as they

matter, for if a vendor cannot produce it, and does not expressly stipulate in the contract or conditions of sale that he shall not be required to do so, it will afford a sufficient ground for a purchaser to rescind his contract; for the latter being a purchaser *pro tanto*, is entitled, as such, to call for the inspection of the title of the original lessor; as, unless the latter had the power to grant the lease, a purchaser holding under it has no security for the enjoyment of his term in the property: (*Fielder v. Hooker*, 2 Mer. 424; *Purvis v. Rayer*, 9 Pri. 488; *Souter v. Drake*, 5 B. & Ald. 992.)

Whether, when vendor takes only a limited interest, he might not dispose of it more advantageously with the concurrence of the other parties interested.—Another important subject of inquiry, where the vendor takes only a limited interest in the property, is to determine whether that interest might not be disposed of more advantageously if the concurrence of other parties also interested could be obtained; as for instance, the concurrence of the reversioner, where the party wishing to sell is only tenant for life, or *vice versâ*; in either of which cases the property would obtain a much higher price if those interests were to be sold combined, than if disposed of singly.

Necessity of ascertaining what incumbrances are matters of conveyance and what are matters of title.—When there are incumbrances on the property, it must be ascertained whether they are mere matters of conveyance, which a vendor has always the power to clear off, or of title over which he has no actual control, the latter of which are always a fatal defect in a title. Under this head may be ranked executory devises, conditional limitations, conditions at common law, remainders not barrable (as remainders under a settlement which are supported by a protector), leases, jointures, dowers, curtesy, annuities and rent charges; bankruptcy and insolvency in the vendor; forfeitures and powers. But, unless in the case of executory devises, it seems that every one of these incumbrances may be removed by the concurrence of the necessary parties; and although an executory limitation over, to take place after an estate in fee simple, being in the nature of an executory devise, cannot be defeated by any act of the parties claiming the preceding estate in fee simple (*Pells v. Brown*, Cro. Jac. 590), it is otherwise when the limitation over is to arise after the estate tail; for, in the latter instance,

it would be in the nature of a conditional limitation, where a recovery in former times as a disentailing deed will now (unless there be a protector to the settlement who refuses his consent), effectually bar the estate depending on that event or condition, provided the assurances should be completed before the event or condition actually takes place: (*Page v. Hayward*, 2 Salk. 570; *Gulliver d. Corrie v. Ashby*, 4 Bur. 1929; *Driver d. Edgar v. Edgar*, Cow. 397.) Even in the case of a condition at common law, which forms a fatal objection to a title, because no act of the party whose estate is burdened with it can defeat such condition or compel the party entitled to the benefit of it to release his right, if the latter can be induced to do so, the objection is removed. The existence of a protector to a settlement who refuses his consent, is also a defect fatal to a title, because no court of law or equity can compel such consent to be given or withheld; neither can the right to consent be controlled; but if given, this defect will be remedied; and in all the other instances, as in the case of widows entitled to dower or jointures, tenants by the curtesy, annuitants, or the like, although none of these persons can be forced to relinquish their rights for any amount of compensation that may be offered them, they are, nevertheless, perfectly at liberty to do so if they think proper; and thus their incumbrances may be made mere matters of conveyance, and all the defects they cause in the title effectually done away with by their concurrence in the purchase deed, or by previously releasing their interests, or claims to the vendor, who by such means will be enabled to convey an unincumbered title.

Incumbrances which are matters of conveyance.—The incumbrances which are mere matters of conveyance, are mortgages, crown debts, judgments, statutes, decrees, *lis pendens*, debts, portions, legacies, and outstanding legal estates. These form no objection to the title, it being always in the vendor's power to get them in, so that there is no actual necessity for his doing so previous to his entering into a contract for the disposal of the property.

Propriety of taking an early opportunity to get in outstanding legal estates.—There are, indeed, many instances where it may be advisable to clear off all incumbrances at the very earliest stage of the proceedings; particularly in the case of outstanding estates in third persons who take no beneficial interest in the property: as for example, where a

mortgage has been paid off, but no reconveyance of the mortgaged premises has been made, or the legal estate has been allowed to remain vested in trustees after a *cestui qui trust* has been entitled to call for a legal conveyance of it; and where a legal estate has been long outstanding, which it becomes necessary to get in, in order to perfect a title, those very persons who would readily have concurred in an assurance for the purpose of simply strengthening the owner's title to his possession, when they find the property is actually in the market, and their concurrence essential to complete the sale, will often give a great deal of trouble, and make very exorbitant demands for so doing, neither of which they would have thought of attempting if they had not believed that the vendor was desirous of either selling or raising money upon the property. It is true a Court of Equity would, in most, if not in all instances, compel parties of this kind to concur, but it must necessarily occupy some time to procure this, and impose some additional expense upon the vendor, even if the court should allow his full costs, and would put him to a very considerable expense if all the costs should happen to be thrown upon his shoulders.

Propriety of getting in legal estate, when the trustee in whom it is vested is in precarious health.—In case, also, any party in whom the legal estate is solely vested is in ill health, it may often be advisable to get a re-conveyance of the legal estate, made either to the vendor or some person on his behalf, to prevent the difficulties which might arise from the estate descending on an infant heir, or a person residing at a distance, or one who might be likely to give trouble by refusing to act in the trust; or where there is no person who can fill the character of heir to the trustee, or it is not clearly known what person is entitled to do so.

As to the propriety of abandoning all thoughts of sale, where vendor is unable to make a title.—In case there are incumbrances that are matters of title, which a vendor has no means of clearing off, it becomes necessary for his solicitor to consider whether they are of such a nature as to render it prudent to abandon all further thoughts of a sale, or to postpone it to some future period, upon the chance of the property becoming exonerated from these burdens by the death of parties, or by the happening of some contingent events upon which the existence of the incumbrances depend; or whether some plan might not be

adopted by which the property might be advantageously disposed of, even subject to the existing charges on it.

How property subject to incumbrances may be disposed of to best advantage.—Where property charged with incumbrances is to be sold, a sale by private contract is generally found to be a better course of proceeding than a public auction. In sales of property so circumstanced, it often becomes necessary for a vendor to insert such special stipulations in his contract as though open to little or no objection when privately discussed, would, if submitted without explanation to the public in the ordinary conditions which accompany a sale by auction, tend considerably to damp the sale, and perhaps deter every one from bidding for the property. It sometimes happens that there are dormant claims upon the estate, which though there is not the remotest probability of their ever being made, are nevertheless a fatal objection to the title. Rights, also, may have been reserved by former owners, which have never been exercised, and in all human probability never will be; as, a right for searching for minerals in a district not adapted for mining purposes. It may also happen, that a person having a claim upon the property, and whose interest determined with his life, or failure of issue, is dead, and there is every reason to believe without issue, but there is no conclusive evidence to prove either of these facts. It sometimes also happens that, though a title is a perfectly safe holding one, and secure from all danger of disturbance, the owner is nevertheless unable to make out a good legal title; as, for instance, where two parties have an equal equitable right to the property, and one of them has defeated the right of the other by length of possession, and thus acquired an absolute equitable interest, although the legal right still remains unbarred. A difficulty may also arise in consequence of the loss of the title deeds, or their being in the hands of a third party, the vendor having no means of compelling their production; or where a vendor has a mere possessory title without any evidence whatever to show its origin; in which case, even a peaceable and uninterrupted possession of sixty years will not confer such a title as a purchaser can be compelled to accept; nor has the recent Statute of Limitations (8 & 4 Will. 4, c. 27) made any alteration in the law in this respect: (*Cooper v. Emery*, Phill. 388; *Hodgkinson v. Cooper*, 6 L. T. Rep. 451.)

Advantages of selling by private contract where the title is

a defective one.].—Now the defects above enumerated, although they form so serious an objection to a title that no purchaser could be compelled to take one so circumstanced, are none of them so insurmountable as to deter a willing purchaser from buying the property, if he saw how little actual danger was really to be apprehended, and that every doubt and difficulty might be explained away or removed by means of a private discussion and inquiry, which could never be managed amidst the bustle of an auction, where any assurances from the auctioneer would be entitled to little, if any, weight; neither would anything which he could say about the matter be binding either upon himself or his principal; as he is incapable of adding to, or subtracting from, anything that is contained in the conditions of sale (*Gunnis v. Erhart*, 1 H. Blackst. 289; *Powell v. Edmunds*, 3 Camp. N. P. C. 285; *Shelton v. Livins*, 3 Crompt. & Jerv. 411; *Bradshaw v. Bennett*, 3 Car. & Pay. 49) a rule of law falling not only within the very letter of the Statute of Frauds (29 Car. 2, c. 3), but founded upon the rules of common law which existed long before: (*Preston v. Merceau*, 2 W. Blackst. 1249; *Parteriche v. Powlett*, 2 Atk. 384; *Davis v. Symonds*, 1 Cox, 402; *Lawson v. Laude*, 1 Dick. 439; *Jenkinson v. Pepys*, 6 Ves. 330; *Higginson v. Clowes*, 15 ib. 516; *Granger v. Worms*, 3 Camp. N. P. C. 33; *Tomkins v. White*, 3 Smith, 435.)

As to arrangements for taking a defective title with an indemnity.].—Instances may also occur in which, by a private arrangement, a purchaser may be content to accept a defective title with an indemnity, although it is quite clear that neither vendor or purchaser have any right to insist upon a contract being completed on such terms; but when a vendor is in affluent circumstances, and is willing to give a sufficient indemnity, the matter may generally be arranged to the mutual advantage of all parties.

General practical observations.].—The above observations, therefore, show how essential it is, that a vendor's solicitor should become thoroughly acquainted with the title of his client, before he ventures to offer his property for sale; for without this knowledge it will be impossible to frame such conditions as will in many cases thoroughly protect the vendor's interests; and for want of these necessary precautions in the beginning, the whole property has too frequently been wasted in long Chancery suits; the object of the contemplated sale, which was, perhaps, to raise only a small

sum of money for some emergency, completely frustrated; and vendors reduced to ruin and beggary, who, but for the woeful mismanagement of their business, would, after clearing off every debt and claim against them, have possessed a considerable residue for their other purposes.

Other advantages of vendor's solicitor being acquainted with vendor's title.]—Another advantage arising from the solicitor thus early acquainting himself with the true state of the vendor's title is, that if he is satisfied of its being a good one, he may then make an advance to the vendor to meet any present emergency, or advise a client to do so, upon a deposit of the title deeds, which, if in extensive practice, he can almost always contrive to arrange; but which he could neither safely nor conscientiously venture upon until convinced that the title is safe and marketable, and the property of adequate value to secure the full amount of money advanced upon such deposit.

III. OF THE NECESSITY OF ASCERTAINING THE NATURE, EXTENT, AND VALUE OF THE PROPERTY.

Nature and extent of Property must be ascertained.]—The nature, extent, and value of the property must also be fully considered; and where lands of different tenures, as freehold, leasehold, and copyhold, are mixed up together, care must be taken to discover the relative proportions they bear to each other, otherwise it will be impossible to frame the particulars of sale, or advertisements of the property, with sufficient accuracy to guard against future disputes and misunderstandings with purchasers, which may lead to litigation and expense, and perhaps be the means, after all these annoyances have been incurred, of the contract being rescinded altogether. If, therefore, there is the slightest doubt either as to the extent or relative proportions which the different kinds of property bear to each other, it will be a better plan to have the whole property surveyed at once, for, under such circumstances, a survey must sooner or later become necessary, and could never be done at a time when the vendor would derive greater advantages from it.

Facilities afforded in the survey of estates by means of the Tithe Commutation Acts.]—A great facility has, however, been latterly afforded throughout every part of England for procuring estates to be surveyed, valued, and mapped by means of the surveys taken under the Tithe

Commutation Acts (6 & 7 Will. 4, c. 71; 7 Will. 4 & 1 Vict. c. 69; 1 & 2 Vict. c. 64; 3 & 4 Vict. c. 32); forming, in fact, a kind of Domesday Book for future generations, which seems likely in many ways to prove beneficial to the present and future proprietors of landed property.

Necessity of ascertaining the value of the property.—But great as these aids may be, some further inquiry will always be necessary; the value of lands in certain localities is very fluctuating, particularly in those districts where trade and population is rapidly increasing or diminishing; some lands which present a sterile and unprofitable surface, contain rich mines of hidden wealth beneath, the value of which is likely to vary as mining interests fail or prosper; many tracts of waste lands, formerly worthless and unprofitable, have been inclosed and drained; some to the vast advantage of the improvers, whilst others have made a very inadequate return for the labour and money expended upon reclaiming them. To arrive at the true value of the property thus situated, must always be attended with difficulty. The annual sum it produces at rack rent affords at best a very uncertain criterion, for it speaks of no more than the return the surface is capable of producing in its present condition. Nor is it sufficient to ascertain what the property will produce at the present moment, it must, if possible, be discovered whether it is likely either to increase or deteriorate in value. This inquiry is particularly necessary where land is intended to be sold or leased for building purposes, when, if it should appear that the property is likely to obtain a higher price if the sale is postponed to some future period, it may be material to consider, if the vendor really is in want of ready money, whether it might not be more eligible to raise such an amount as he might require for his present purposes by effecting a mortgage on the property, and to delay the actual sale until the opportunity arrives of disposing of it at an increased price.

IV. OF THE ADVERTISEMENTS AND OTHER STEPS TO BE TAKEN
IN ORDER TO GIVE PUBLICITY TO THE SALE.

1. In ordinary cases.
2. Where the sale is made under a decree.

1. *In ordinary cases.*

How and in what manner the property should be advertised.—If the property is intended to be sold by public auction, notice of the time and place of sale should be advertised in such newspapers as are in most general circulation in the neighbourhood of the property, as also in some of the leading London journals. Handbills and notices to the same effect should also be posted about in some conspicuous places in the market-towns adjoining, and in the bars of inns and hotels, and all such other places as are likely to attract public notice; as also in the offices of the vendor's solicitor, and those of any of his professional friends who will give them a place there.

How the advertisements should be framed.—The advertisements, in addition to stating the time and place of sale, should include the name of the auctioneer, and also the name and place of abode of the vendor's solicitor, and of the vendor on whose behalf the sale is to be made. It should also contain a general description of the property, number of lots, quantity of acres, and the particular kind of tenure under which the property is holden, and the burdens or outgoings, if any, subject to which it is intended to be sold.

Propriety of qualifying notice in case property should be sold by private contract.—It is often advisable to qualify the notice of the time of sale by stating that it will take place upon some stated day, "unless previously disposed of by private contract, of which due notice will be given." And in case such sale by private contract really does take place before the time appointed for the sale by auction, such notice should be given accordingly. In fact, in every case where property advertised to be sold by public auction is in the interim disposed of by private contract, or if by any other circumstances the sale by auction is prevented from taking place at the time originally mentioned, early notice to that effect should be given and circulated with equal publicity as the previous advertisements, in order that parties may not be unnecessarily put to the trouble and

expense of attending the proposed place of sale, when in point of fact no actual sale is intended to take place there.

2. *Where the sale is made under a decree.*

Practice of preparing and inserting advertisements.—When a sale is made under a decree of the Court of Equity, the practice formerly was for the particulars of sale to be prepared and approved of by the Master previously to the advertisement, and his signature must have been procured before this could have been done; but the practice now is to prepare the advertisement on a sheet of paper duly stamped, and to take it, with a plain copy, to the judge's clerk for approval, and upon being signed by him it is inserted in the *London Gazette*, and such of the public newspapers as he shall direct, and if the sale is to take place in the country, he will also direct the advertisements to be inserted in the provincial newspapers published near the place where the property is situated: (Ayck. Chan. Pract. 425, 5th edit. 429, 430.)

Alterations with respect to advertisements effected by recent Orders.—The fee for every advertisement is 1*l.* payable by means of a stamp: (6th Order, 25th October, 1852; Ayck. Chan. Pract. 425, 5th edit. 429, 430.) It was also formerly the practice to have two advertisements; in the first no time of sale was appointed; but in the second, which was termed the peremptory advertisement, which was usually inserted about three weeks afterwards, the time and place of sale were both fixed upon: (Smith Pract. 172, 2nd edit. 1 Turn. Pract. 127.) But now, under the more recent Orders, where advertisements are required, for every purpose only one, and that a peremptory advertisement, is to be issued, unless for any special reason it may be thought necessary to issue a second, or any, further advertisements; and any advertisement may be repeated as many times, and in such manner as may be directed: (83rd Order, 16th Oct. 1852.)

Modern course of proceedings to get advertisements inserted.—The usual practice is to take the advertisements and copies to the General Advertising Office, No. 42, Chancery-lane, and upon receiving the instructions they cause the advertisements to be inserted in all the necessary papers. The solicitor should bespeak copies of the Gazette and papers, and retain them in his hands as vouchers in the case: (Ayck. Pract. 425, 5th edit.)

V. DIRECTIONS FOR PREPARING THE PARTICULARS AND CONDITIONS OF SALE IN ORDINARY CASES.

1. As to the particulars.
2. As to the conditions of sale.
 1. As to freeholds.
 2. As to leaseholds.
 3. As to copyholds.
 4. Of growing timber.
 5. Of life estates, and reversionary interests, policies of insurance, shares in public companies, shipping interests, and of goods, furniture, and other effects.

Particulars or conditions of sale incapable of being altered by parol.—The preparation of the particulars and conditions of sale requires considerable care and attention. They ought to be clear, explicit, and utterly devoid of doubtful or ambiguous expressions, for, as we have previously observed (*ante*, p. 20), no verbal explanation by the auctioneer, vendor's agent, the vendor himself, or any person whatsoever, is admissible for the purpose of varying, adding to, subtracting from, or contradicting, anything contained in either the particulars or conditions, &c.

As to the heading of the particulars.—The particulars should commence as in the advertisement before mentioned (*ante*, p. 23) with setting out the time and place of sale, the name of the auctioneer, as also of the vendor's solicitor or agent, and that of the vendor or vendors on whose behalf the property is to be sold.

When the estate is sold on behalf of several distinct parties.—If, as sometimes happens, the estate is sold on behalf of several distinct parties, as, where the property which is to form the subject-matter of sale has been mortgaged to several distinct persons, who have entered into a mutual arrangement to concur in the sale, in such cases the name of the party in whose behalf the particular portion is sold may be set out in the following terms:—

“This lot (or these lots, *as the case may be*) is (or are) sold on behalf of J. S., of _____, &c., gentleman, under the several trusts and powers of sale contained in a certain indenture of release by way of mortgage. Dated the _____ day of _____.”

1. *As to the Particulars.*

Practical directions for preparing particulars of sale.—In framing the particulars of sale, the property should be
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described with every possible degree of accuracy. The several closes or allotments should be set out, and severally described, specifying their respective qualities; as arable, meadow, pasture, orchard ground, or the like; as also the number of acres, or other quantity of land each close contains. The particulars should also state the nature of the tenure, as, whether the property is freehold, or copyhold, or leasehold.

Propriety of describing the property accurately.—Where various kinds of property lie intermixed together, the relative proportions which they bear to each other should be distinctly pointed out; and whatever may be the nature of the property, the description of it must never be exaggerated in extent, or any qualities asserted to belong to it which it does not really possess; for such a misdescription will authorize a purchaser who has been misled by it to rescind the contract *in toto*. As, for example, where an estate is stated to be but one mile from a borough town, from which it is actually four or five miles distant (*Duke of Norfolk v. Worthy*, 1 Camp. N. P. C. 337); or a vendor contracts to sell an estate with the right of shooting, which latter right he does not possess (*Stock v. Rook*, 1 T. R. 387); or to sell an estate tithe free, which in point of fact is not so (*Stewart v. Alliston*, 1 Mer. 26); in every one of which cases the purchaser may vacate the sale, and cannot be compelled to complete the contract upon receiving pecuniary compensation for the decreased value occasioned by any of the above mentioned drawbacks.

Concealment of defects will afford ground for annulling contract.—The vendor must also be equally careful not to conceal defects, for this, when wilfully done, will afford a purchaser the same grounds for rescinding the contract as in cases of actual misrepresentation: (*Shirley v. Stratton*, 1 Bro. C. C. 140; see also *Cox v. Middleton*, 23 L. T. Rep. 6.) Hence where a vendor put up for sale by auction lands described as eligible for building, and after a contract had been made, the purchaser discovered that there existed rights in third parties to have water supplied to them through parts of the land, by means of an underground course, with liberty for such third parties to open, cleanse, and repair the water course, making satisfaction for damage done by them; it was held that the vendor could not, under the circumstances, enforce the contract, and that existence of the easement was not a subject of compensation:

(*Shackleton v. Sutcliffe*, V. C. Bruce's Court, 10 L. T. Rep. 411.) It is the duty of a vendor, when he puts up property for sale, to inform himself (if he does not know them) of all the particulars of the premises he is going to sell; and in describing them to state every thing material to the condition and value of the property. A purchaser is not supposed to be cognizant of all the circumstances of the property, even if it should appear that he resided close by it. No more knowledge will be imputed to him than may be gathered from the printed particulars of sale, and what any person might derive from ocular inspection of the property (*Bradley v. Plummer*, 23 L. T. Rep. 329); it is no set-off to misrepresentations made by the vendor, for him to say that the purchaser might have seen the premises, and known the truth: (*Cox v. Middleton*, 23 L. T. Rep. 6.)

Misdescription as to quantity may be made a subject of compensation.—But, generally speaking, where the misdescription in the particulars is merely as to the quantity, it is treated as a fit matter for compensation, the amount of which the purchaser will be allowed to deduct out of his purchase money, and this a vendor will be compelled to allow, without showing that the misdescription arose from any fraudulent intent on his part: (*Winch v. Winchester*, 1 Ves. & B. 375.)

How vendor should guard against liability for misdescription as to quantity.—To guard against this consequence, it is usual to stipulate in the conditions of sale, that the numbers of acres advertised as being according to admeasurement are believed to be correct, but are not warranted to be so: (see the form, Concise Precedents, Vol. 1, No. 2, clause 8, p. 7; and see *Winch v. Winchester*, 1 Ves. & Beam. 375.)

Vendor cannot protect himself against his wilful misrepresentations.—But the clause we have just alluded to will only afford protection to a vendor who is ignorant of the true extent of the property; for, if it could be shown that he knew what the exact quantity was, and described the property as containing more, the mere insertion of the words, "be the same more or less," will not protect him against the effects of his fraudulent statement: (*Duke of Norfolk v. Worthy*, 1 Camp. N. P. C. 337.)

In a recent decision (*Leslie v. Thompson*, 17 L. T. Rep. 277), a point was raised as to whether, in a case where

beyond the description of the lands, &c., there is a general statement of the total acreage, with the qualification "*more or less*," the presumption to sell the property in a lump was not negatived? The court held that it was.

Measurement.]—Before the passing of the statute 5 Geo. 4, c. 2, where a person entered into a contract for the sale of any specified number of acres, known by estimation of limits, such acres were to be taken according to the estimation of the county where the lands were situate, and not according to the statute measurement: (*Morgan v. Tedcastle*, Poph. 55; *Lloyd v. Bethell*, 1 Roll. Rep. 520.) But the law is altered in this respect, by the enactment above alluded to, which directs that in all cases where any special agreement shall be made in respect of any measure established by local custom, the proportion which any such local measure shall bear to any of the said standard measures set forth by that act shall be specified in the agreement, otherwise such agreement shall be null and void.

All incumbrances should be specified, when property is sold subject to them.]—Where property is intended to be sold subject to incumbrances, such incumbrances should be set forth accurately, and the amount of the charge clearly defined, so that a purchaser cannot possibly be misled as to the full extent and nature of it. If omitted, or even if misstated, provided the incumbrances be such as are matter of title, the purchaser may rescind the contract, and cannot be compelled to take the property with any amount of compensation. But incumbrances which are mere matters of conveyance, as mortgages, judgments, or the like, will afford no ground for vacating the sale; and the vendor will be compelled to discharge them; and cannot, in the absence of an express stipulation to that effect, oblige the purchaser to take the property subject to those charges, by allowing him an adequate compensation for them.

As to annuities, and under what circumstances such charges cease to be incumbrances which are matter of title.]—It may be proper here to observe, that although annuities charged on real estates are considered as incumbrances which are matter of title, because a vendor of property so charged has no power or right to compel the annuitants to release their interests; yet this rule will only hold where it is evident the person creating those charges intended that the land should be a continued and subsisting fund for their pay-

ment (*Elliott v. Merryman*, Barnardist. 82; *Wynn v. Williams*, 5 Ves. 130; *Page v. Adam*, 10 L. J. (N. S.) 407); for if the lands are at the same time subjected to other charges, which may render a sale of the lands themselves necessary to raise the proper funds to discharge them, as, where a testator devises all his estate, real and personal, to A., subject to the payment of debts, legacies, and annuities, in which case the devisee may always sell to pay the debts and legacies, the annuities will not only cease to be incumbrances which are matters of title, but even of conveyance, as the devisee will be able to make a good title to a purchaser without the annuitant's even concurring in the conveyance (*Page v. Adams*, *supra*); and unless the particular debts are specified or scheduled, the purchaser will be exonerated from all responsibility with respect to seeing to the application of the purchase money: (3 Prest. Abs. 360; see also *Anon.* Mos. 96; *Newell v. Ward*, Nels. Cha. Rep. 38; *Walker v. Smallwood*, Ambl. 677; *Bailey v. Ekins*, 7 Ves. 323; *Shaw v. Borrer*, 1 Kee. 599; *Ball v. Harris*, 8 Sim. 485; S. C., 4 Myl. & Cra. 264; *Robinson v. Lowther*, 23 L. T. Rep. 85.) Neither will the circumstance of some particular debt being specified in the will, where the testator charges his real estate generally with the payment of his debts, create an exception to the rule, that where there is a general charge in a will for the payment of debts, a purchaser of the property so charged is exempted from seeing to the application of the purchase money: (*Robinson v. Lowther*, 23 L. T. Rep. 17, 85; *Storrs v. Walsh*, *ib.* 35.)

Quit rents.—If the premises are subject to the payment of a quit rent, that fact, as also the amount of rent, should be stated.

How existing leases should be set forth in the particulars.—In all cases where there are any existing leases of the property, the term for which it is let, and the amount of rent, should be accurately stated. The term “*clear yearly rent*,” in an agreement between vendor and purchaser, means clear of all outgoing, incumbrances, and extraordinary charges, not according to the custom of the country; as tithes, poor-rates, church rates, and like charges, which are natural charges on the tenant: (*Earl of Tyrconnel v. Duke of Ancaster*, 5 Ves. 500.) Any unusual covenants, or other matters contained in any such lease, should also be set forth.

Value of property should be correctly stated.—The value

of the property should also be stated correctly ; for although a bare assertion that the property is of such and such a value, although greatly exaggerated, will not entitle a purchaser to relief, because it was simply his own folly to credit a bare assertion, so commonly made by sellers of property to advance the price of it (*Harvey v. Young*, Yelv. 20), still, if the vendor were to insert in the particulars of sale that it had been valued by competent persons at a higher sum than it actually was, and it could be shown that a purchaser was deceived by such misrepresentation, a Court of Equity would relieve him from a specific performance ; and it also seems, that a vendor would, under such circumstances, be prevented from recovering at law for the non-performance of the contract : (*Buxton v. Cooper*, 4 Atk. 383.)

If property is to be sold subject to succession or legacy duty it should be so stated.—If the property sold is subject to the duty on successions, or legacy duty, or any other deduction, those facts must be stated in the particulars of sale : (*Dyke v. Blake*, 4 Bing. N. C. 463, 467 ; see also *Dawes v. King*, 1 Stark. 5.)

Where rights have been reserved by former grantors, they should be set out in the particulars.—Where any rights have been reserved by former grantors, it should be stated that the purchaser is to take the property subject to those rights ; for in a case where a vendor contracted to sell certain lands, and it was afterwards discovered that a right of entry had been reserved by a former owner of the property for the purpose of searching for minerals, the vendor was compelled to complete the sale and make compensation to the purchaser, and was not permitted to waive the contract upon undertaking to place the vendee in the same situation he would have been if no such contract had been ever entered into : (*Seaman v. Vawdrey*, 16 Ves. 323.) In one case, indeed, where an estate had been originally granted by the Crown, in which grant there was a reservation of all royal mines, *but without a right of entry*, a specific performance was decreed without compensation, on the ground, it appears, that there had been no search for royal mines for upwards of a century ; that the probability was great that there were no such mines, and that the Crown, for *want of a right of entry*, was unable to grant a lease to any one to work them : (*Lyddall v. Weston*, 2 Atk. 19.) The correctness of this decree is very questionable, and would scarcely be followed at the present day. A reservation of mines,

although it may never be exercised by the party reserving such right, will effectually prevent the purchaser from so doing, and by this means he may possibly be debarred from exercising one of the most valuable privileges he could derive from the property. The inference as to the belief of the existence or non-existence of minerals beneath the surface is not to be regarded; for many mines have sprung up, and are constantly being discovered in localities in which no one at the time *Liddell v. Weston* was determined would ever have dreamt of finding anything of the kind. In that case, therefore, the vendor was unable to confer a very important privilege connected with the occupation and enjoyment of the property, and the purchaser was therefore, consistently with every principle of equity and justice, entitled to compensation for it.

Right of entry not barred by non-user.—And here we consider it proper to observe that where a *right of entry for the purpose of working mines has been reserved*, that right will not be barred by the simple fact of non-user. In *Smith v. Lloyd* (22 L. T. Rep. 289) the owner of a close having under it a stratum of coal and minerals, conveyed the surface to one under whom the plaintiff claimed, and who had made no entry for the purpose for more than forty years. It was held that the right was not barred by the Statute of Limitations by simple non-user, no other person having worked, or been in the possession, of the mines. The statute, said the court, applies not to cases of want of actual possession by the plaintiff, but to cases where he has been out of it, and another in the possession for the prescribed time. There must be both absence of possession by the person who has the right, and of actual possession by another, whether adverse or not, to bring the case within the statute.

Vendor's estate and interest in the property must be accurately set forth.—The interest which the vendor takes in the property he is authorized to dispose of must be accurately stated, as an omission in this respect will authorize a purchaser, if he thinks proper, to rescind the contract, although the latter may, if he chooses, insist upon a specific performance, which a Court of Equity will enforce, with a compensation for the difference in value between the interest contracted for, and that which the vendor really had the power to dispose of: (*Milligen v. Cook*, 16 Ves. 1; *Seaman v. Vawdrey*, *ib.* 290; and see *Halsey v. Grant*, 13 *ib.* 37; *Hill v. Buckley*, 17 *ib.* 401; *Grant v. Munt*, Coop. 173; *Mortlock v. Butler*,

10 Ves. 316.) Hence, if the particulars were to describe the property sold to be a freehold estate, when in fact the vendor had only a term of years in it; or even if it should be stated that it was held by tenants under leases, or written agreements, where the tenancy was by parol only (*Wood v. Griffith*, 1 Wils. 44; *Attorney General v. Gower*, 1 Ves. sen. 228; *Barker v. Damer*, 4 Mad. 431); or land stated to be freehold should turn out to be of copyhold, or customary tenure (*Twining v. Morrice*, 3 Bro. C. C. 326; see also *Hicks v. Phillips*, Pre. Cha. 573); or a vendor should have only an undivided part where he contracted to sell the whole (*Roffey v. Shallcross*, 4 Mad. Rep. 227; *Dalby v. Pullen*, 2 Sim. 29; *Casamajor v. Strode*, 3 Mer. 726); or an under-lease, where he contracted to sell a lease; in every one of such cases a purchaser may, if he pleases, rescind the contract, or hold the vendor to a specific performance with a compensation. Nor will a vendor be able to get off completing the contract on the latter terms, notwithstanding he himself may have been deceived as to the true nature of the property he contemplated selling; his best way of guarding against such a consequence is to ascertain, as he ought to do, what interest he actually takes in the property before he enters into any contract respecting it; or, if any doubt exists about the matter, to insert an express stipulation authorizing him to annul the sale in case it should turn out, upon the investigation of the title, that he has not the interest in the premises he pretended to sell, and that he shall not be compelled to assign any lesser estate he may chance to have therein; or it may be stipulated that the contract shall not be annulled by such a mistake or error in the particulars, but that a compensation shall be made, the amount of which, in case of dispute, shall be fixed by two referees or their umpire in the usual manner.

Clauses stipulating that mistakes or errors in description shall not annul sale, will be insufficient to protect vendor against existing rights of way not set out in the particulars.]

—It seems, however, that a clause of this kind will be insufficient to protect a vendor where a right of way exists over the property, of which no mention is made in the particulars. Thus, in *Dykes v. Blake* (4 Bing. N. C. 476), by particulars of sale, lot 13 was described as building ground, and adjoining the lot 12 as a villa, subject to liberty for the purchaser of lot 1 to come on the premises to repair drains, &c., as reserved in lot 7. The reservation in lot 7, referred to a lease which gave to the occupier of that and several

adjoining lots composing a row of houses, a carriage way in common in front of the lots, and a footway at the back, and also a footway over lot 14. The particulars contained plans which disclosed the carriage way in front, and the footway at the back of the house, but not the footway over lot 13. But they stated that the lease of lot 7 might be seen at the vendor's office, and would be produced at the sale. Plaintiff having purchased lots 12 and 13 by one contract, in ignorance of the footway over lot 13, it was held that the misdescription was such as to entitle him to rescind the contract as to the both lots.

Misrepresentation will render party liable to an action.]—Neither is the liability to have the contract annulled by a misdescription of the property the only one to which a vendor may subject himself; for if a vendor, or any other person, makes such a misrepresentation, whether it be made with a view to deceive a purchaser, or in favour of a vendor, or from the hope of any personal advantage to himself, or from ill-will, or from mere wantonness, he will render himself liable to an action at law for the deceit: (*Ekins v. Thresham*, 1 Lev. 102; *Risney v. Selby*, 1 Salk. 211; *Pasley v. Freeman*, 3 T. R. 51; *Eyre v. Dunsford*, 13 East, 318; *Haycroft v. Creasy*, 2 East, 92; *Hutchinson v. Bell*, 1 Taunt. 558; *De Graves v. Smith*, 2 Camp. N. P. C. 533; *Foster v. Charles*, 6 Bing. 396, 7 *ib.* 105; *Dorbert v. Brown*, 2 Mood. & Malk. 108; *Dobell v. Stephens*, 3 B. & C. 623; *Freeman v. Baker*, 7 B. & A. 795.)

Where the property contracted for is misdescribed, vendor cannot require purchaser to take another in lieu of it with a compensation.]—It will be proper also to remark that wherever there is an error in the description, whether it be by fraud, or by mistake, accident or inadvertence, the purchaser cannot be compelled to take another property with a compensation in lieu of the one erroneously described; as, where the particulars stated one of the houses to be No. 4, instead of No. 2, although the names of the occupiers were correctly stated, and both houses were of the same description, but No. 4 was in rather better repair than the other; in which case it was held that the purchaser was entitled to vacate the contract, and recover his deposit notwithstanding the usual condition: (*Leach v. Mullett*, 3 Car. & Pay. 115.)

How leasehold property should be set out in the particu-

lars.—Where the subject-matter of sale consists of leasehold property, the term for which the premises are holden, and the duration of the vendor's interest, the amount of reserved rents and all other outgoings should be accurately stated, as a misdescription in any of these matters would probably vitiate the sale altogether: (*Farrer v. Nightingale*, 2 Esp. N. P. C. 639; *Pasley v. Freeman*, 5 T. R. 21; *Stewart v. Alliston*, 1 Mer. 26; *Waring v. Hoggart*, 1 Ry. & Man. 39; *Flight v. Booth*, 1 Bing. N. C. 370; *Ballard v. Avery*, 1 Mees. & Wels. 520.)

Jones v. Edney.—Thus in *Jones v. Edney* (3 Camp. N. P. C. 337), where in the particulars of sale a leasehold house was stated to be "*a free public house*," when in reality the lease contained an express covenant to take beer from the lessor, upon that ground the purchaser refused to complete the contract, and having brought his action recovered back the amount of the deposit money he had paid.

Any unusual covenants in a lease should be set out in particulars.—And wherever a lease contains any unusual covenants, particularly such as are of a burdensome nature to a lessee, they should be distinctly set out. Common and usual covenants in a lease of a public house have been construed to include covenants to pay land tax, sewers rate, and other taxes, and a proviso for re-entry, if any other business but that of a licensed victualler should be carried on in the house: (*Bennett v. Womack*, 7 B. & C. 627; S. C., 1 Man. & Ry. 644.) But a covenant to take wine, spirits, or ale of the lessor, though a very usual one where a vintner or a brewer lets a public-house, is, in the eye of the law, viewed neither as a usual, or a common covenant, nor as one which, under those terms, a lessor would be entitled to have inserted in his lease; neither does a covenant not to assign without licence, whether the lease be of a public-house or of any other kind of property, although frequently introduced into leases, come within the description of either a *common*, or a *usual* covenant: (*Henderson v. Hay*, 3 Bro. C. C. 632; *Church v. Brown*, 15 Ves. 529; *Brown v. Ruban*, 15 Ves. 529; *Bennett v. Womack*, 9 B. & C. 627; *Yan v. Cope*, 3 Myl. & Kee. 269; *Propert v. Parker*, ib. 280.)

Dropping of lives should be noticed when lease is so determinable.—If the property is determinable on lives, the

names and ages of the lives should be stated correctly, and if any of the lives should happen to drop before the time of sale, the particulars should be altered so as to correspond with that circumstance, as a mere verbal statement of that fact by the auctioneer will have no effect whatever in rectifying the misstatement in the written or printed particulars.

Practical suggestions..]—The following form may be found useful for setting out the particulars of leasehold property determinable on lives :—

Lots.	Particulars.	Age of Lives in the year 18 .	Quantity of Acres in Statute Measure.		
			A.	R.	P.
1	Home close	46 .. 28 .. 32	7	0	12
2	Barn close	26 .. 24 .. 54	8	1	15
3	Broom tenement	46 .. 28 .. 32	13	0	22
	Tenement in Week and common..	0 .. 54 .. 0	28	2	19
	Brown's tenement, water and grist mills	40 .. 32 .. 0	5	2	1

As to reversions..]—And where the subject-matter of sale is a reversion expectant on leases determinable on lives, the terms should be stated as well as the ages of lives, and whether any of them have dropped in the same manner as in the last mentioned form.

How far misrepresentation will vitiate sale..]—In the case of leasehold property, any misrepresentation as to the duration of the vendor's interest will at law afford a sufficient ground for a purchaser to vacate the sale : (*Guest v. Homfray*, 5 Ves. 818; *Hanger v. Eyles*, 21 Vin. Abr. pl. 1.) But a Court of Equity, if the deficiency is not very great, will generally support the contract, deducting a proportionate part of the purchase money. Still, if the number of years is considerably less than for the term the vendor has agreed to sell, as, for example, when the term is stated to be sixteen years, when in fact it is only six (*Long v. Fletcher*, 2 Eq. Ca. Abr. 5), a Court of Equity, so far from interfering to aid a vendor in so flagrant a case of misrepresentation, would make him pay all the costs, and even assist the purchaser to recover any deposit he may have paid. At the same time, agreements of this kind ought to receive

a reasonable construction, as the parties cannot be supposed to intend that there shall be the exact term, neither more nor less by a single day; and it seems not unreasonable that the period mentioned in the agreement should be calculated from the last preceding day when the rent was payable, including therefore the current half-year: (*Belworth v. Hassell*, 4 Camp. N. P. C. 140.)

In case any alteration has occurred in the property since the granting of the lease, as, if any buildings on the demised property have been removed (*Granger v. Worms*, 4 Camp. N. P. C. 83), those facts must be stated in the particulars, otherwise a purchaser will not be bound to complete the contract, and this, notwithstanding the purchaser had heard the lease read previously to his signing the agreement.

Particulars may be either printed or written.—The particulars of sale may be either written or printed, but the latter seems the usual plan, as affording greater facility of circulation. The particulars are attached to the conditions of sale, but very often the printed handbills which contain the advertisements of the property are applied to this purpose.

2. *As to the Conditions of Sale.*

1. As to freeholds.
2. As to leaseholds.
3. As to copyholds.
4. Of growing timber.
5. Of life estates, and reversionary interests, policies of insurance, shares in public companies, shipping interests, and of goods, furniture, and other effects.

1. *As to freeholds.*

As to the conditions.—The conditions of sale may be either printed or written; but in sales of large property the former plan is commonly adopted, as affording a wider means of circulation.

Lots to be put up at a price to be named by the auctioneer.—These conditions usually stipulate that the several lots shall be put at such prices as shall be named by the auctioneer at the time of sale.

How conditions should be penned when the property is sold entire.—But if the property is sold entire, and not in lots, the above clause is omitted, and the conditions commence

with the following one, which is a usual clause in either case, viz :

That the highest bidder shall be the purchaser.—“That the highest bidder shall be the purchaser (subject to the right of the vendor, his solicitor, or agent, to bid once), and that if any dispute shall arise as to the last or highest bidding for the lot (or property, *as the case may be*), the lot (or property), with respect to which such dispute shall arise, shall be put up again at the last preceding undisputed bidding.”

No person to offer less than a certain sum.—It is also usual to stipulate, that no person shall advance a less sum at the bidding than shall be named by the auctioneer, at the time of putting up each lot, or retract his or her bidding.

Auction duties, and remuneration of auctioneer.—The clause as to the payment of the auction duty was usually inserted next, to which it was sometimes superadded that the purchaser should pay a certain sum to the auctioneer for his trouble. But auction duties having been repealed by a recent statute (8 Vict. c. 15, s. 1), the former portion of the clause must now, of course, be left out.

As to payment of deposit.—Next comes the clause as to the payment of the deposit, which usually stipulates that the respective purchasers, immediately upon any lot being knocked down to them, shall pay down a deposit, either into the hands of the auctioneer, or of the vendor's agent, in part payment of the purchase money, and, at the same time, sign an agreement to pay the remainder at some time or place mentioned in the conditions on the completion of the purchase : (see the form, 1 Hughes' Concise Precedents, Part I., No. I., clause 2, p. 2, 2nd edition.)

As to the payment of interest on the purchase money.—To the above-mentioned clause is often added a stipulation that, in case the sale is not completed at the appointed time, the purchaser shall pay interest on the purchase money, to which latter clause is commonly superadded a proviso that this shall not give the purchaser any right of entry on the purchased property until payment of the whole of the purchase money (see the form, 1 Con. Prec. p. 3, 2nd edit.); for although it is by no means uncommon in the case of sales by private contract, when the intended purchaser is previously known to the vendor, to agree that the

former shall be let into the possession and receipt of the rents and profits on some specified day, without reference to the time at which the contract is to be completed; such a stipulation is not so often inserted in the conditions of sale, where, until the sale actually takes place, it is uncertain who the purchaser really may be.

Vendor not entitled to interest when the delay in completing purchase arises from his own default.—It must be borne in mind that in those cases where the contract is not completed at the appointed time, the clause above mentioned will not render a purchaser liable to the payment of any interest, when the delay in completing the purchase is occasioned by the vendor's own default: (*Wilson v. Clapham*, 1 Jac. & Walk. 36.) But in the absence of vexatious conduct, or gross delay, or any unfair dealings on the part of the vendor, if the conditions stipulate that the purchaser shall pay interest on the purchase money, if the contract is not completed on the day named, the purchaser must, in such case, pay interest from the time so mentioned, and not from the time when a good title was first shown: (*Robertson v. Skelton*, 15 L. T. Rep. 129; *De Visme v. De Visme*, 14 ib. 169; S. C., 1 Mac. & G. 336; *Sherwin v. Shakespeare*, 24 L. T. Rep. 45, reversing the decision of the Master of the Rolls, 21 L. T. Rep. 252.)

Rule as to payment of interest where conditions are silent upon the subject.—Where the conditions are silent on the subject, the rule is that the purchaser shall pay interest on the purchase money, and the purchaser be entitled to the rents and profits of the premises, from the time at which the purchase was appointed to be completed; but this rule does not hold good where the delay has been caused by the vendor, or the purchase money has lain unproductive in the purchaser's hands, of which the vendor has notice, or the interest exceeds the amount of the rents and profits: (*Wilson v. Clapham*, 1 Jac. & Walk. 36.) To prevent a purchaser from availing himself of these exceptions, it is sometimes added to the end of the clause stipulating that the purchaser shall pay "interest on his unpaid purchase money, and which interest shall be so paid as aforesaid, notwithstanding the purchaser shall not be entitled to the possession, or the purchase money shall have remained unproductive in his hands without producing interest, and although the vendor shall have express notice that such purchase money is so lying unproductive as aforesaid."

As to the delivery of the abstract.—The clause relating to the delivery of the abstract, and the stipulations as to the objections or requisitions which the purchasers may make to the title, is generally the next inserted.

It usually runs to the following effect: "That the vendor will, at his own expense, within the space of one calendar month from the day of sale, deliver abstracts of title to the respective purchasers (or purchaser, *as the case may be*), or their (or his) solicitors (or solicitor), and deduce a good title thereto, subject to the conditions. And each of the said purchasers (or the purchaser, *as the case may be*), shall, within [*some certain specified time*] next after the delivery of such abstract, signify in writing to the vendor's solicitor, their, his, or her objection to, or requisition on the title as deduced by such abstract; and that in default of their, his, or her so doing within the appointed time, they, he, or she, shall be considered as having accepted the title unconditionally." It is also advisable to add that "every such objection or requisition, not made or taken in writing within such period shall be considered as waived; and in this respect, that time shall be considered as part of the essence of the contract."

Time within which abstract is to be delivered, ought to be specified.—The time within which the abstract is to be delivered should always be specified; for although if no time is appointed, it will be sufficient if it be delivered within a reasonable time, still what limit will be so considered is involved in so much doubt, that no solicitor who consults his client's interest would allow the question to be raised if any proper care or foresight on his part could prevent it, which in this instance may be done with ease and certainty by only setting out in the conditions what the limit of time really is to be.

Precautions to be taken by vendor where he has a doubtful title.—In case a vendor has the slightest reason to suppose he may be unable to confer a good title, it will be advisable for him to insert—

"That in case any purchaser or purchasers, or their, his, or her solicitor shall object to the title, the vendor shall be at liberty, if he shall so think fit, to vacate the sale, unless the purchaser shall (*within some specified time, as fourteen or twenty-one days for instance,*) consent to accept the title unconditionally; and that such right of the vendor to annul the sale shall not be considered as waived by any negotiation as to such objection or requisition, or attempt to obviate such objection, or to comply with any such requisition, or to remedy

any defect that may be objected to :” (see the form, 1 Con. Prec., p. 4, 2nd edit. *in notis*.)

Advantages of a clause according to the above directions.]

—The object of the latter part of this clause is to prevent any subsequent negotiation from depriving the vendor of his right to annul the sale; for it seems that if he was to attempt to answer any objections or requisitions made by the purchaser, he would thereby be considered to have waived his right to rescind the contract. It seems, however, from the suggestion thrown out by Wigram, V. C. in *Thorley v. Cook* (12 L. J. Rep. 136), that a vendor might protect himself by answering the objection under an express protest that it was to be without prejudice to his right of rescinding the contract in pursuance of the terms of the condition; and there can be no doubt but that the same object may be attained by inserting the clause in the conditions to the same effect.

How conditions should be penned when it is probable vendor may be unable to show title to some portion of the property.]

—If there is any probability of the vendor being unable to show a good title to the property, or, where it is sold in lots, to any one of the lots, or part of any one of the lots it should be stipulated that his incapacity to do so shall not vitiate the contract with regard to the other portion of the property, or lots, to which he is able to make a title; but that the contract shall nevertheless be carried into effect *pro tanto*, and a proportionate abatement allowed out of the purchase money, as a compensation, the amount of which shall be settled by the award of two referees or their umpire in the usual manner: (see the form, 1 Con. Prec., p. 7, *in notis*, 2nd edit.)

Whether defect in title as to part of the lands will affect the contract as to the remainder.]—By means of a clause of this kind a vendor will be able to hold a purchaser to his contract with respect to that portion of the property to which a good title can be made, which he might not otherwise have been able to do; for notwithstanding it appears formerly to have been a doubtful question whether, when an estate was sold in lots, to some of which a vendor was unable to make a title, a purchaser of the whole would not have been obliged to accept those to which a title could have been made, with a compensation; yet thus much seems to be settled, that where property is sold in lots, and no

title can be made to a lot complicated with the rest, and essential to their enjoyment; as where a contract is for a house and wharf, and no title can be made to the latter, or a mansion-house is sold in one lot, and farms and other lands in other lots, and no title can be made to the lot containing the mansion, the purchaser would not be compelled to take the remaining lots with a compensation, by deducting the purchase money in respect of the remaining property: (*Stapleton v. Scott*, 13 Ves. 427; *Knatchbull v. Gruebar*, 1 Mod. 153; see also *Dobell v. Hutchinson*, 3 Ad. & Ell. 355; *Mills v. Oddey*, 2 Cr. & Mees. 103.)

Practical suggestions.—For the reasons above stated, whenever the subject-matter of sale consists of property held under various tenures, as freehold, leasehold, or copyhold, or it is doubtful whether the whole property is freehold, or what exact relative proportion such mixed kind of properties bear to each other, it will be prudent to stipulate, that if any question shall arise upon the matter, or any mistake or error shall appear in the particulars, such mistake or error shall not annul the sale, but a compensation shall be made, to be settled by arbitration in the usual manner: (see the form, 1 Con. Prec., p. 8, *in notis*, 2nd edit.)

How conditions should be penned where there is any confusion as to boundaries or identity of parcels.—And in all cases where the property is of a mixed kind, and there is any reason to apprehend that doubts may arise as to the exact boundaries or identity of the different parcels, it should be stipulated, that where on account of any of the property having been conveyed or passed under a general description, or hedges having been pulled down, or otherwise, sufficient evidence of seisin or of boundaries is not afforded on the face of the deed, or court rolls, a declaration, in pursuance of the act of the fifth and sixth years of the reign of his late Majesty King William the Fourth, for the suppression of extra-judicial oaths and affidavits, of the possession, or of the receipt of the rents for twenty years and upwards, according to the title deduced, or of the identity of the premises, shall in any case, not expressly provided for in the conditions, be deemed sufficient evidence of seisin and identity.

Propriety of stipulating that no error in description shall vitiate sale.—It should also, for the reasons before stated be stipulated that no error in the description, either in

the quantity of the property sold, or of the extent of the vendor's interest therein, shall annul the sale; but that the purchaser shall be allowed compensation to the extent that he shall have been prejudiced thereby; the amount of which is to be settled by arbitration in the usual way: (see the form, 1 Con. Prec., Part I., No. I., clause 8, p. 7, 2nd edit.) But this clause, as we have previously noticed, (*ante*, p. 27), will only protect a vendor against unintentional errors, and not against a fraudulent or wilful misdescription.

Where lands are contracted to be sold tithe free.—In the case of the sale of lands which are alleged to be tithe free, it may be stipulated that the purchaser shall not be entitled to require any further evidence of the lands being tithe free than proof of the fact that no tithe has ever been paid in respect of the premises: (see Bateman on Auctions, 86.) And where lands have been allotted in lieu of right of common, it may be stipulated that all allotments in lieu of such rights shall be taken to be lawfully made, and that the vendor shall not be required to prove any title to such rights of common or other lands, in respect of which such allotments were made, other than as appears by the abstract: (see the form, Bateman on Auctions, 86.)

As to enfranchised copyholds.—And where copyholds have been enfranchised, and the vendor wishes to protect himself against being compelled to produce the lord's title, it will be proper to stipulate, "that the purchaser shall presume that the premises were formerly of copyhold or customary tenure, duly enfranchised in the year (*setting out the date of year in which the enfranchisement took place*), and converted into freehold; and shall not be entitled to call for the production of the title of the lord of the manor, or require any evidence of his power to make such enfranchisement:" (see the form, Bateman on Auctions, 86.)

Propriety of stating at what time title shall commence.—It will often be advisable to state at what time the title is to commence, and also the date and nature of the documents which are to show the root or origin of such title, as—

"That the title shall commence with certain indentures of lease and release," &c.

And where the property is sold in lots—

“That the title to lot 1, shall commence with the will of (*name of testator*) bearing date, &c.

“The title to lot 2, with certain indentures of lease and release, bearing date, &c. (*setting out the date and names of parties*), and a common recovery suffered in pursuance thereof in Hilary Term following.

“And that the title to lot 3, shall commence with (*setting out in like manner the nature of document, date, and names of parties as with respect to the two preceding lots.*)”

To this it should be added that the vendor shall not be required to produce any earlier title, or be responsible for any defects which may appear in it; or the purchaser permitted to take any objection to such earlier title: (see the form, 1 Con. Prec., Part I., No. I., p. 5 in *notis*, 2nd edit.)

Importance of vendor protecting himself against being compelled to produce earlier title.—The latter stipulation may sometimes prove very important to a vendor; for, without such a stipulation it seems that a condition restraining a purchaser from requiring the production of a title anterior to a specified period, does not preclude him from seeking out *aliunde*, and showing an actual defect in such anterior title: (*Shepherd v. Keatley*, 1 C. M. & R. 117; *S. C.* 4 Tyrw. 571; *Edwards v. Leary*, Coop. 308; *Hyde v. Dallaway*, 1 Beav. 606; *Fowler v. Hartop*, 7 Jur. 613; *Dick v. Donald*, 1 Bligh, 655; *Southby v. Hutt*, 2 Myl. & Cra. 207; *Sellick v. Trevor*, 11 Mees. & Wels. 724.) Yet it seems that even a stipulation of this nature will not protect a vendor who is really aware of the defect, and withholds the disclosure of it. The only certain way, therefore, he has of getting over the difficulty is to pursue an open, honest, and straightforward course, and set out the nature of the defect, whatever it may be, and state that the purchaser is to buy subject to it.

Importance of framing conditions in a clear and accurate manner.—And in instances of the latter description care must be taken to frame the conditions in a clear and accurate manner, so as to be totally free from ambiguity; for in cases of any doubt arising upon their construction, the court inclines rather in favour of the purchaser than of the vendor: (*Wilmot v. Wilkinson*, 6 B. & C. 506; *Symons v. James*, 1 You. & Coll. 490; *Morley v. Cook*, 2 Hare, 15); and in a late case, where one of the conditions was that the purchaser should take such a title as the vendor had, Wood, V. C.

held, that this did not relieve a vendor from the duty of showing a *bonâ fide* title, and the best title he can produce from the evidence within his power: (*Keyse v. Heyden*, 23 L. T. Rep. 244.)

Purchaser not allowed to take advantage of the omission of any special condition.—Nevertheless, a purchaser will not be allowed to take undue advantage of the omission of any special conditions. And even a stipulation that a vendor will give such a title as shall be satisfactory to the purchaser, has been held not to authorize the latter to make any other than the usual objections to the title: (*Lord v. Stephens*, 1 You. & Coll. 223.)

Sometimes stipulated that vendor shall give a bond of indemnity against incumbrances.—Sometimes it is stipulated in the conditions, that the vendor shall indemnify the purchaser against any incumbrance that may affect the property, which, although the vendor may have ample means, he is not in a present position to discharge; as where the property is charged with the payment of legacies or portions, and the parties to whom they are payable are under age, and unable to give an effectual discharge for the same, in which case it may be stipulated that the vendor shall indemnify the purchaser against these charges, by a bond to be prepared at the vendor's expense in a sufficient penalty, and that the purchaser shall be satisfied with such indemnity; and shall not be permitted to object to the title on account of the non-payment of such charges: (see the form, Bateman on Auctions, 95.)

How vendor should exonerate himself from the production of documents over which he has no control.—In case the vendor is not in the possession of all the title deeds, and is desirous of exonerating himself from their production, he must expressly stipulate that he shall not be obliged to produce any title deeds or other documents set out in the abstract, which shall not be in his possession; otherwise, the usual provision to produce a good title will entitle a purchaser to call upon him for the production of all the abstracted documents, without reference to any possession or control he may have over them: (*Southby v. Hutt*, 2 Myl. & Cra. 207.)

As to the barring of estates tail, acknowledgments of married women, &c.—Whenever it may be necessary to bar any

estates tail, or to obtain the acknowledgments of any married women to perfect the title, it is usual to provide that these expenses shall be defrayed by the vendor (see the form, 1 Con. Prec., No. I., clause 4, p. 4, 2nd edit.), although in the absence of any such stipulation, he must clearly have borne them; as also the expense of getting-in outstanding legal estates, and all other incidental costs connected with the establishment of the title (*Boughton v. Jewell*, 15 Ves. 176; *Hughes v. Wynn*, 8 Sim. 75), as also all expenses incurred in deducing evidence of births, marriages, and deaths, payment of money, intestacies, or the like; as also those attending the production and comparison of title deeds, wills, and other evidences of title, whether in the possession of the vendor or otherwise, all of which, as we have just before remarked unless a vendor protects himself by some express stipulation to the contrary, he is bound at his own expense to produce, as he also is to defray the costs incurred in the examination of the court rolls, where the property is copyhold (*Whitbread v. Jordan*, 1 You. & Coll. 317), as also travelling, and all other incidental expenses connected with any one of the above purposes; so that, whenever a purchaser is to bear any of these burdens upon his own shoulders, an express stipulation to that effect must always be inserted in the conditions: (see the form, 1 Con. Prec., Part I., No. I., clause 4, p. 4, 2nd edit.)

Recitals in ancient deeds to be sufficient evidence of the facts recited.—It is, also, in the same clause the usual practice to stipulate, that the recital of all facts of what nature or kind soever, contained in deeds, or court rolls of twenty years old or upwards, shall be sufficient evidence of those facts. (*Id. ib.*)

By whom the costs of production of documents shall be borne.—The same clause, also, frequently provides that the vendors shall bear the expenses attendant on the production of the documents of title, as also of procuring copies, extracts, or abstracts of the same. (*Id. ib.*) And here it will be proper to describe the copies as attested, or other copies; for instances have occurred in which purchasers have taken advantage of the omission of the words "or other," and have demanded simple fair copies at the vendor's expense, which demands have often been complied with rather than litigate the matter, and thus the vendors were put to an expense it was their intention to have guarded against, and

from which two words more in the conditions would have effectually protected them from.

Stipulations that purchaser shall be at the expense of comparing deeds with abstract.—It is also a common stipulation to provide :

“That the purchaser shall be at the expense of comparing the title deeds, wills, and other documents and evidences of title, whether of record or not, and whether in the possession of the vendor or not, with the abstract ; the vendor engaging to furnish such abstract, and to inform the purchaser when and where such deeds, wills, documents, or other evidences of title, if of record, were proved, and recorded, and where, and with whom such of the title deeds and other evidences of title as are not of record, and not in the custody of the vendor, are to be found, in order that they may be so produced and compared.”

In small purchases vendor sometimes stipulates to deliver title deeds to purchaser for inspection.—Sometimes, in order to save the expense of an abstract in cases of small purchases, the vendor stipulates to hand over the title deeds to the purchaser, upon the latter entering into a guarantee to keep them safe ; and to re-deliver them upon demand without charge, and at the same time, providing that the vendor shall not be required to deliver any abstract, or incur any expense in making out or clearing up the title, or in conveying the property to the purchaser, or otherwise relating thereto.

As to sales by assignees.—Where the property is sold by assignees under proceedings in bankruptcy, it should be expressly stipulated that the purchaser shall not require any of such proceedings to be entered of record, unless the same shall be done at his own expense.

As to sales by trustees.—Where the sale is by trustees, it should be stated, “that as the vendors sell in the character of trustees, and take no beneficial interest in the property, the purchasers shall not require them to enter into any further covenants for title, except the usual covenants by vendors that they have done no act to incumber.”

Sales under inclosure acts.—And where the sale is under an inclosure act, it should be stipulated, “that the remainder of the purchase money shall be paid within three months next after the sale into the hands of the inclosure commissioners, according to the directions of the General Inclosure Act, upon receipt of which purchase money, the said com-

missioners shall convey and assure the said land, and the fee simple and inheritance thereof in possession, by conveyance under their hands and seals, to such uses, and in such manner as the purchaser shall direct."

What stipulations should be inserted when the title deeds are not to be delivered over to the purchaser.—If the title deeds are not to be delivered over to the purchaser, it will be necessary to make some stipulation as to their possession, either where they are to be retained by the vendor himself, or delivered over to some of the other purchasers. As a general rule, where there are several purchasers, the largest purchaser is entitled to the custody of the deeds; but in order to prevent all disputes about the matter, it should be clearly stated in the conditions, whether the largest purchaser in extent of property, or the largest in amount of price, is to have the custody. In a recent case (*Griffith v. Hatchard*, 23 L. T. Rep. 295), an estate was put up for sale by auction in lots, and by the conditions of sale, it was stipulated that the purchaser of the largest lot should have the custody of the title deeds. Wood, V. C., held that the words signified the most extensive in acreage, and not the highest in price. The term "largest lot" clearly expressed largest in quantity. But generally speaking, the term "largest purchaser" would be construed to mean largest in value according to the amount of purchase money, and not largest in extent according to acreage.

When vendor is to retain deeds, how conditions should be penned.—When the deeds are to be retained by the vendor, the conditions generally stipulate that he is to retain such of the deeds, &c., as relate also to other property belonging to him of greater value, on his delivering attested copies, and entering into the usual covenant for their production: (see the form, 1 Con. Prec., Part I., No. I., p. 8, 2nd edit. *in notis.*)

How penned when the deeds are to be delivered over to the largest purchaser.—Whenever the largest purchaser is to have the custody of the title deeds and other documents it should be stipulated that he is to have them delivered to him upon his entering into the usual covenant for their production; and that the purchaser shall be entitled to attested copies of them; and unless the latter are to be supplied at the vendor's expense, it must be so expressly stated in the conditions: (see the form, 1 Con. Prec. Part I., p. 8, 2nd edit. *in notis.*)

When timber is intended to be sold separately.—Whenever it is intended that the purchaser is to pay for the timber separate from the lands, it must be so stated in the conditions, otherwise the timber will pass as part of the freehold to which it is annexed; and as the term “timber” includes some particular kinds of trees only, which in some instances depends upon the local customs of some particular counties, it will always be advisable where the timber is to be sold separately, to particularize what kind of trees are to be so considered, so as, if possible, to prevent any further disputes from arising upon the matter: (see the form, 1 Con. Prec., Part I., No. I., clause 7, p. 6, 2nd edit.)

How conditions should be penned where fixtures are intended to be sold separate from the freehold.—In case also any of the fixtures attached to the freehold are to be sold separately from it, an express stipulation to that effect should always be inserted, and in which it should be stated:

“That the fixtures mentioned and set forth in the schedule hereunto annexed, shall be taken by the purchaser at a valuation, the amount of which (if disputed) shall be determined by the award of two referees, or their umpire, in manner above mentioned.”

Schedule containing particulars of fixtures should be attached to conditions.—A schedule containing the particulars of the fixtures should be attached to the particulars or conditions of sale.

As to payment of purchase money and execution of conveyances.—The conditions must also stipulate that upon payment of the purchase money at the appointed time, the vendor and all other necessary parties will convey to the purchaser: (see the form, 1 Con. Prec., Part I., No. I., clause 6, p. 6, 2nd edit.) It should also state at whose expense the conveyance is to be prepared and executed.

What persons are entitled to prepare the conveyance.—In the absence of any such stipulation the purchaser is to defray the costs, and his solicitor is entitled to prepare and tender the conveyance to the vendor and other necessary parties for execution; but the expenses of the execution are borne by the vendor. In the county of Cornwall it has been the established practice for the vendor's solicitor to prepare the conveyance, but for which the purchaser pays, as also for the contract; the amount of the charge for the same being often inserted in the conditions of sale. In some localities, solicitors have formed themselves into societies and laid

down certain rules and regulations in this respect by which they are governed; although they treat these rules as binding amongst each other, they adhere to the ordinary rules of the profession when transacting business with solicitors who are not members of their association; and amongst many of these societies the practice is for the vendor's solicitor to prepare the conveyance at the costs of the purchaser, which often leads to the vendor's solicitor being the only one employed, who consequently acts in that character both for vendor and purchaser. This course of proceeding is very injurious to the interests of the latter, as is indeed the simple act of allowing the vendor's solicitor to prepare the conveyance, for by so doing the purchaser adopts him as his agent, and thereby becomes fixed with notice of all incumbrances affecting the purchased property to which the vendor's agent is privy—notice to the agent being considered in the eye of the law as equivalent to notice to the principal himself; and thus the latter may lose the benefit of the equitable protection afforded to purchasers for valuable consideration without notice, in every case in which the vendor's solicitor is cognizant of any incumbrance: (*Winged v. Lefebury*, 1 Eq. Cas. Abr. 32; *Brotherton v. Hatt*, 2 Ves. 754; *Jackson's Case*, Lane, 607; *Newstead v. Searles*, 1 Atk. 265; *Brooke v. Bulkley*, 2 Ves. sen. 408; *Ashlie v. Baillie*, ib. 368; *Varney v. Cording*, ib. 345; *Crofton v. Ormsby*, 2 ib. 583; *Dunbar v. Frederick*, 2 Ball. & B. 304; *Tunstall v. Trappes*, 3 Sim. 301.) Nor is the above the only objection to employing the vendor's solicitor; for if the vendor were to be guilty of any fraud in the conduct of the sale, to which the attorney was privy, the purchaser, notwithstanding his ignorance of the transaction will, nevertheless, be bound by it: (*Bowles v. Stewart*, 1 Sch. & Lef. 227; see also *Doe v. Martin*, 4 T. R. 39; *Hicks v. Morant*, You. & Jerv. 286.)

As to clause empowering vendor to rescind contract and resell the premises, upon purchaser failing to comply with the conditions.—The last clause in the conditions generally empowers the vendor to rescind the contract in case the purchaser fails to comply with the conditions and to retain the deposit, and also to recover the amount of any loss he may incur on a resale from the intended purchaser as liquidated damages.

Advantages afforded to vendor by above-mentioned clause.] This clause is a very important one for a vendor, as it

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not only has the effect of giving him a lien on the estate for the purchase money, but also enables him to recover the amount of any deficiency incurred by him on a resale, in case of the purchaser's failing to comply with the conditions, whilst, at the same time, he will be allowed to retain any increase of price for his own benefit: (*Ex parte Hunter*, 6 Ves. 94; and see *Moss v. Matthews*, 3 ib. 379; *Mertins v. Adcock*, 4 Esp. N. P. C. 251; *Greves v. Ashlin*, 3 Camp. N. P. C. 466; *Lamond v. Davall*, 6 Ad. & El. N.S. 1030.)

Short form of contract should be attached to conditions of sale.—A short form of contract, to be signed by the vendor and purchaser, or their agents, should be indorsed or otherwise attached to the conditions, and when so annexed and signed the whole together forms one entire contract: (see the form of contract, 1 Con. Prec., 2nd edit., Part I., No. I., clause 10, p. 8.)

2. As to leaseholds.

Heading of condition of sale.—In the conditions of sale of leasehold property, the heading sets out the time and place of sale, and the name of the auctioneer and vendor's agent, in the same way as in the case of the sale of freeholds; and the clauses that the highest bidder shall be the purchaser, and that the purchaser shall pay down a deposit, and to supply an abstract, are also inserted in the same order; and in the latter clause, unless the vendor is able to procure his lessor's title, he ought, for the reasons before mentioned, expressly to stipulate that he shall not be required to do so: (see the form, 1 Con. Prec., Part I., No. III., clause 1, p. 10, 2nd edit.)

Vendor to be allowed to rescind contract in case purchaser objects to title.—A similar clause, allowing the vendor to annul the sale in case the purchaser objects to the title, as in the case of freeholds, is next inserted, and that if the purchaser's solicitor shall approve of the title, the vendor will assign the premises upon payment of the remainder of the purchase money: (see the form, 1 Con. Prec., Part I., No. II., clause 2, p. 10, 2nd edit.)

All outgoings to be discharged by vendor up to a certain period.—It is next commonly stipulated that the vendor shall discharge all outgoings up to a certain period: (see the form, 1 Con. Prec., Part I., No. II., clause 3, p. 11.)

And where the vendor is also the original lessee, it is sometimes stipulated that the purchaser shall enter into a bond or deed of covenant to indemnify the former from all liabilities on account of the rents and covenants of the lease, but which, in point of fact, a vendor is entitled to have inserted, whether stipulated for or not: (*Pember v. Mathers*, 1 Bro. C. C. 52; *Staines v. Morris*, 1 Ves. & Beav. 8.)

Where vendor sells only a portion of the property, and is desirous of apportioning the rents.—Where the vendor sells only a portion of his leasehold property and is desirous of apportioning the rent without an underlease, a clause should be inserted, stating :

“That as the premises intended to be sold are included in the same lease with other property of the vendor, it is intended that the rent shall be apportioned (*set out what proportions according to circumstances*), and that each of the said premises shall become charged with such apportioned rents accordingly, and the vendor and purchaser shall enter into mutual covenants with each other for the payment and performance of his respective portion of the rents and covenants, reserved and contained in the original lease of the premises on the lessee's part to be paid and performed, and to give each other a cross power of distress upon the premises purchased and retained respectively as an indemnity against such proportion; such deed of indemnity to be prepared at the joint expense of both parties.”

As to indemnity to vendor, where he is the original lessee.—Where the vendor is the original lessee, it may be stipulated that the purchaser shall indemnify him against the rents and covenants in the lease.

As to power for vendor to annul contract.—As in sales of freehold property, the conditions conclude with a similar clause as in the case of freeholds, that on the purchaser failing to complete the contract he will forfeit the deposit, and that vendor shall be at liberty to resell the premises, and recover any loss thereby incurred as liquidated damages.

That lessee shall not require any other evidence of payment of rent and performance of covenants than the production of last receipt of rent.—A stipulation is also sometimes inserted, that the lessee shall not require any other evidence of the payment of rents, and observance and performance of the covenants in the original lease of the premises on the lessee's part to be had, observed and performed, than the production of the last receipt of the rent up to some specified time.

As to the ages of lives.—Where the lease is determinable on lives, it will be proper to state “that the ages of the several parties for whose lives the lease is holden are believed to be correctly stated in the particulars, but are not warranted to be so; and the purchaser shall take the statement in the existing leases of the ages of such lives as conclusive evidence of those ages respectively.”

Sometimes stipulated that contract shall not be affected by the dropping of any of the lives.—It is also sometimes stipulated that the purchaser shall not be entitled to any compensation, or to rescind the contract in case any, or even all, of the lives upon which the lease is determinable shall happen to drop between the time of signing the contract and that appointed for the completion of the purchase.

Purchaser after signing the contract must abide by all profits or losses that may accrue to the property.—This stipulation is inserted rather with a view of preventing disputes, than from any actual necessity; for as a purchaser is considered as the equitable owner the instant he signs the contract, he must abide the chance of all profit or loss that may accrue to the property from that time to the execution of the conveyance. Like a two-edged sword, the rule cuts both ways. If the subject matter of sale be houses which are all burnt down (*Paine v. Meller*, 6 Ves. 349; *Ex parte Minor*, 11 Ves. 559), or an estate that is determinable on lives which all drop off prior to the conveyance (*Anson v. Towgood*, 1 Jac. & Walk. 637), the purchaser is no less bound to pay the purchase money than if the property had remained in precisely the same state as when he signed the contract; so, on the other hand, if he were to contract for the purchase of a reversionary interest, and all the preceding estates were to determine prior to the time for executing the conveyance (1 Mad. 539); or where the consideration is an annuity for the life of the vendor, who dies before any payment of the annuity becomes due (*Mortimer v. Capper*, 1 Bro. C. C. 156; *Jackson v. Lever*, 3 ib. 695), the purchaser will be entitled to a specific performance of the contract, although in the first instance he acquires a different and more valuable estate and interest in the property than the one he contracted to buy, and in the latter he gets the property without paying any consideration whatever for it; and this equitable rule accords with the rule of the civil law, that the purchaser should benefit by the accretion to the estate before the conveyance; *nam et commodum ejus*

esse debet cujus periculum est, Inst. III., XXIV., 3. And notwithstanding Lord Keeper Wright, in *White v. Nutt* (1 P. Wms. 62), when he ordered a specific performance in the case of a sale of leaseholds, where one of the lives had dropped previously to the conveyance, is reported to have expressed an opinion that if all the lives had dropped before the conveyance, it might have been another consideration, it was held in *Anson v. Towgood* (*supra*), that a purchaser of a life interest in a sale under a decree, upon the report being confirmed of his being the purchaser, (which places him then, but not before, in the same situation as a purchaser who signs a contract under ordinary circumstances), will be bound, although the life should drop on the same night.

Practical suggestions.]—Whenever, therefore, it is designed that on the happening of either of the above-mentioned events, the contract is to be vacated, or that the party obtaining the benefit, or sustaining a loss from the change, is to receive or give compensation accordingly, an express stipulation to that effect will be necessary; there being no other means, except framing the conditions in such a shape as to negative its operation of guarding against the consequences of the equitable rule, that a party agreeing to buy is considered as the purchaser, and takes the property with all its incidents and liabilities from the time he signs the contract.

Purchaser not compelled to complete his purchase unless vendor can confer a good title.]—But although a purchaser who enters into a contract will be bound to fulfil his contract notwithstanding the subsequent destruction of the property, yet he will not be compelled to do this unless in cases where he must have performed it specifically, had such property remained in an unaltered condition; and therefore, if the vendor is unable to confer a good title, or has done any act which entitles a purchaser to waive the contract, the latter will of course be authorized to vacate the sale, without any reference to the state and condition of the property either one way or the other.

3. As to copyholds.

How the conditions should be headed.]—In sales of copyholds, the conditions are headed in the same manner as in the sale of a freehold or leasehold property, and contain the like clauses, that the highest bidder shall be the purchaser; that the purchaser shall pay down a deposit; and that vendor will deliver an abstract.

That vendor will convey on approval of title.—It is then usually stated that if the purchaser's solicitor shall approve of the title, the vendor will surrender or otherwise convey and assure the copyholds to the purchaser, or to his use, according to the custom of the manor, and that the vendor and all necessary parties will execute all necessary assurances for that purpose: (see the forms, 1 Con. Prec., Part I., No. V., clauses 3 and 4, pp. 24, 25.)

Outgoings up to time of surrender to be paid by vendor.—It is also usual to stipulate that all outgoings are to be discharged by the vendor up to time of the surrender to the purchaser's use: (see the form, 1 Con. Prec., Part I., No. V., clause 7, p. 26.)

Conditions should state by whom expenses of surrender and admittances are to be borne.—The conditions should also state by whom the expenses of the surrenders and admittances are to be defrayed. These, in the absence of any stipulation to the contrary, must be borne by the purchaser, as also of the fines payable upon his admission as tenant to the copyhold premises: (*Drury v. Munn*, 1 Atk. 95.) If, therefore, but as does not often occur, it is intended that these charges are to be borne by the vendor, it should be so stated in the conditions (see the form, 1 Con. Prec., p. 26, 2nd edit. *in notis*); and this should in express terms be extended to the fine, when it is intended that the vendor himself shall pay it; for an agreement, or even a covenant, from the vendor to convey and assure copyholds at his own expense, will not render him liable to the payment of the fine, the title to the purchaser being perfected by the admission, and the fine not being payable until afterwards: (*Graham v. Sime*, 1 East, 632; and see 1 Wat. Cop. 347 edit. Coventry, n. (1); see also *Dalton v. Hammond*, Cro. Eliz. 779; *Fisher v. Rogers*, 1 Roll. Abr. 506, pl. 1; *Rex v. Lord of the Manor of Hendon*, 2 T. R. 434.)

As to costs of admission of heir, where tenant dies pending the contract.—In a case recently decided, by the conditions of sale the purchasers were to have all proper surrenders, conveyances, &c., at their own expense. After some delay, and a substitution of purchasers, all the lots were purchased by the same parties. After the sale, but before the completion of the surrender, the tenant on the court rolls died, and a fine and fees were payable on the admission of his heir. It was held that the purchaser was not liable for these pay-

ments; nor under the conditions was he liable to the expense of procuring all proper parties to concur: (*Paramore v. Green-slade*, 22 L. T. Rep. 182.)

4. *Of growing timber.*

How conditions should be penned in sales of growing timber.—Conditions of growing timber are headed in the same manner as those relating to the sales of freehold, leasehold, or copyhold premises; and contain similar clauses with respect to the biddings and paying down the deposit; the conditions then set out, that the purchaser is to have a right of entry for the purpose of felling and carrying off the timber, and to use horses and carriages, and all other implements, to make sawpits, and saw the trees in some convenient part of the premises: (see the form, Bateman on Auctions, No. 6, clause V., p. 123.)

By the sale of trees a right of entry to fell them is implied by law.—The grant of the right of entry is inserted, rather for the sake of avoiding disputes in case of the question arising, than from any actual necessity that such grant should be made in express terms, as by the sale of the trees a right to enter and cut them down is implied by law: (11 Co. 52 a; Finch L. 63; Plow. Com. 16; Noy Max. 55, 9th edit.) It is usual, however, to restrict the right of entry to some particular time: (see the form, Bateman on Auctions, No. 6, clause VI., p. 124; 1 Con. Prec., 2nd edit., Part I., No. IX., clause 3, p. 38.)

It is also usual to stipulate that the purchaser shall carry away all the timber before some particular day named in the conditions, and also repair all injury done to the hedges and fences, and also fill up all sawpits within the space of one calendar month after the time allowed him to construct the same shall have expired, and make compensation for all damage done to the crops: (see the form, Bateman on Auctions, No. 6, clause VII., p. 124; 1 Con. Prec., Part I., No. IX., clauses 3 and 4, p. 38, 2nd edit.)

Purchaser to get out roots and spurs, &c.—In addition to those above mentioned, special clauses are sometimes added; as that the purchaser shall get the roots and spurs of all such trees as are axe-fallen, out of the ground in a workmanlike manner, and with respect to such trees as grow on the banks of any rivers, that they shall be felled in such a manner as that the banks may not be broken: (see the form, Bateman on Auctions, No. 6, clause VI., p. 823.)

The Attorney's Pocket Book (p. 246, Shipman's edit.) also contains the two following conditions which may sometimes be found useful, viz. :

"That the purchaser shall have the boughs and tops of the timber and other trees cut off and laid under the bodies thereof, or under the hedges and fences by which the least damage can be done to the crops of grain, within three days after such being fallen, and shall not work or carry away any part of the said timber or other trees, till after such crops of grain are cut or carried, except the bark of such timber or other trees, which the purchaser shall have carried from and off the said crops of grain without taking any horse or carriage on such crops for such purpose."

"That the purchaser shall allow (*some stated number, as five for instance*) stakes for every tree fallen in the hedge-rows or fences, to make up the gaps in the said fences where such trees are so fallen as aforesaid; and also a full compensation for all damages sustained in falling such ash, underwood, timber, and other trees (except such as are necessary and reasonable.)"

Conditions should state how purchase money is to be paid.]—The conditions should also state at what time and in what manner the remainder of the purchase money shall be paid: (see the form, Bateman, No. 6, clause IX., p. 124.) Sometimes it is added to the clause directing that the purchaser shall pay down a deposit, that he shall, within the space of some short period (as three or four days, or a week), enter into a bond (either with or without sureties, as the case may be) for the payment of the remainder of the purchase money at the time appointed by the conditions; and that until such security is given, the timber shall be considered as the property of the vendor, whether taken possession of or felled by the purchaser, or otherwise.

Propriety of referring disputes to arbitration.]—It should also be provided that all disputes are to be referred to arbitration, in the usual manner: (see the form, 1 Con. Prec., Part I., No. IX., clause 5, p. 38, 2nd edit.)

How conditions should be penned when the sale is made by tenant for life or in tail.]—In case the sale is made by a tenant for life without impeachment of waste, or a tenant in tail, it will be proper to stipulate that if the vendor should die before the time of severance, the purchaser shall be entitled to compensation: (see the form, 1 Con. Prec., Part I., No. IX., *in notis*, p. 39.) This clause is of the utmost importance to a purchaser, and without it he could not safely enter into a contract with vendors circumstanced as above mentioned; for although tenants for life without impeachment of waste, and tenants in tail, have the power to cut

down and sell timber, or to authorize others so to do, yet, unless such timber be severed during the continuance of their estate in the lands, the sale will be void as against the reversioner, who will be entitled to claim all such timber as remains unsevered on his accession to the property on which it grows, without making any kind of compensation to the disappointed purchaser: (Bro. Abr. Cont. 26; *Lilford's case*, 11 Co. 50, a; Hob. 173; Poph. 64; 3 Bac. Abr. 64; Com. Dig. *Biens*, H.)

5. *Of life estates and reversionary interests, policies of assurance, shares in public companies, shipping interests, and of goods, furniture, and other effects.*

As to life estates and reversionary interests.]—Where life estates, or reversionary interests are sold, these interests should be correctly described, and the ages of the lives correctly set forth, unless no legal proof can be obtained as to such ages, in which case they should be stated as nearly in accordance with the fact as circumstances will admit of; and it should be stated in the conditions that the age or respective ages of the life, or several lives are believed to be correct, but are not warranted to be so, and that the purchaser shall not require any evidence of such age or ages of such persons, and shall make no objection to the title on account of any inaccuracy in the statement of those ages.

If contract is to be varied by the dropping of lives, it should be so stated.]—It will also be advisable to stipulate that in case any of the lives should drop before the time of the completion of the purchase, whether or not the purchase money is to be paid, or the contract shall be annulled thereby, which, as we have already seen (*ante*, p. 52), will not be varied by the happening of those events in the absence of an express stipulation to that effect.

As to policies of assurance.]—Where a policy of assurance is to be sold, it will be proper to insert the following conditions, viz.:

"That the certificate of baptism shall be considered conclusive evidence of the age of the party whose life shall be assured."

"That the vendor shall not be required to furnish any further evidence of the validity of the policy than the solemn declaration of (*name of life assured*) that when the policy was effected he was in a good state of health, and that he has done no act whereby the policy can be vacated or prejudiced; and also the production of the receipt for the premium last due."

Shares in public companies.—In the case of any sales of shares in public companies, the statute 8 & 9 Vict. c. 16, ss. 14 and 15, contains general directions as to the manner in which such shares are to be sold and transferred; still, notwithstanding these directions, it will be advisable, in nearly every case, to refer to the local acts for regulating the company, and to pen the conditions accordingly.

How the conditions are to be framed.—The conditions in all the instances last alluded to are headed in the same manner as those we have previously treated on; they set out with the same provisions as to the biddings and payment of the deposit, and then specify when, where, and how the balance of the purchase money is to be paid. A stipulation is also sometimes inserted, that in case of any delay in completing the purchase, the buyer shall pay interest on the unpaid portion of the purchase money.

Of interests in shipping.—Sales and transfers of ships or interests in shipping are regulated by the Customs Acts of Parliament, and the form of the conditions varies from those we have previously been treating upon.

How the conditions are usually penned.—In sales of shipping interests, the conditions commence by stating that the owners of the ship or vessel (*setting out the name of the vessel and of her port of registry, and measurement of tons*) cause her to be offered for sale on the conditions following, which are to the following effect:—That the owners agree that the last bidder shall be the purchaser, who is immediately to pay down some specified portion of the purchase money (as one-fourth, for instance), and the residue within some specified time after the sale, or at the time of the delivery of the bill of sale, whichever may first happen, and also some specified sum (as two guineas) to the broker, to bind the bargain. And it then goes on to state, that on payment of the remainder of the purchase money, a bill of sale shall be made out to the purchaser at his own expense, and the vessel, with all belonging to her, delivered according to the inventory; but which inventory shall be made good as to quantity only: (see the form, Bateman, No. 7, p. 126.)

Stipulation that vessel shall be taken with all her faults how far binding.—It is also usual to stipulate that the vessel and stores shall be taken with all faults, without any allowance for defects; and under this condition a vendor will be

protected against any latent defects, unless he has used some trick or artifice to conceal them from the purchaser (*Baglehole v. Walters*, 1 Camp. N. P. C. 154), or employs any means to prevent the latter from detecting them, or makes a fraudulent misstatement as to the real condition of the vessel, in either of which cases, as in those other instances of wilful misrepresentation we have previously mentioned (*ante*, p. 27), the mere statement in the conditions that the property is to be purchased with all its faults, will afford no protection to a vendor who wilfully conceals those faults from view, nor prevent a purchaser, upon detecting them, from avoiding the sale; or from insisting, in case it is carried on, that a sufficient deduction shall be made out of the purchase money to compensate him for these defects.

As to clause for rescinding sale on non-compliance with terms of contract.]—It should then be provided that if the purchaser makes default in payment of the remainder of the purchase money, the deposit shall be forfeited, and the vendors be at liberty to resell the vessel; and also that neither the broker, nor any of the present owners, shall be accountable for the deposit money so forfeited, but that the purchasers so neglecting shall be liable for all losses which may be accrued thereby. The ship is declared to be at the risk of the purchaser immediately after he shall be put in possession of her: (see the form of conditions for the sale of a ship, Bateman, No. 7, p. 125.)

Conditions of sale of goods.]—On sales of household furniture and other effects, the conditions usually state that the highest bidder shall be the purchaser, and that if any dispute shall arise as to which is the highest bidder, the lot shall be put up again; that no less than certain specified advances shall be made at each bidding; that the purchasers shall give their names and places of abode (if required), and pay down a deposit, in default of which the lots will be again put up and resold; that the lots shall be taken with all faults, at the purchasers' expense, within some specified time (as within two days after the sale, for instance), and the remainder of the purchase money to be absolutely paid on or before the delivery: (see the form, Bateman, No. 8, p. 127.)

Sometimes directed that a stated sum shall be paid by way of earnest money.]—To the clause directing the payment of the deposit, it is sometimes superadded that the purchaser shall pay some stated sum, as 1s. 6d., to bind the bargain,

for all lots under 5*l.* value; 2*s.* 6*d.* for all lots under 10*l.* value; 5*s.* for all lots under 20*l.* value; and so on, in proportion to the value of such lot or lots: (Bateman, 127, *in notis.*)

VI. PRACTICE AS TO THE PREPARATION OF THE PARTICULARS AND CONDITIONS WHERE A SALE IS MADE UNDER A DECREE OR ORDER OF A COURT OF EQUITY.

Proceedings prior to the preparation of the conditions.—In sales under a decree or order of a Court of Equity, the practice now is, previously to putting up the property for sale, to place the abstract of title before some conveyancing counsel, to be approved of by the court, for his opinion thereon, the better to enable the court to give the necessary directions respecting the conditions, and other matters connected with the sale; and when an estate or interest shall be so put up for sale, a time for the delivery of the abstract of title thereto to the purchaser, or his solicitor, shall be specified in the said conditions of sale: (15 & 16 Vict. c. 86, s. 56.)

Proceedings to get abstracts referred to counsel.—To get the abstracts so referred to counsel, the judge's clerk will deliver to the solicitor having the conduct of the sale a memorandum or note, which is taken to the registrar's clerk, and the matter is thereupon referred to counsel: (Ayck. Pract. 430.)

As to framing particulars and conditions of sale.—The particulars and conditions should be penned with the same care and accuracy as ordinary sales by auction. The particulars should be intituled in the cause, and contain a general description of the property, in whose possession it is, or has lately been, and the lots in which it is to be sold. It must also be set forth that the sale is made in pursuance of a decree or order of the Court of Chancery; and these particulars should be annexed to the conditions of sale. If reserved biddings are fixed, they must be made one of the conditions of sale: (*Ib.*)

Particulars and conditions usually prepared by plaintiff's solicitor.—The particulars and conditions are usually prepared by the plaintiff's solicitor, but, if of a very special nature, they ought to be prepared by the same counsel to whom the abstract has been submitted, and upon whose opinion they are to be framed.

How particulars and conditions are settled, allowed, and distributed.—When the particulars and conditions are prepared, they are afterwards settled and allowed by the judge's clerk, and a fair copy made and forwarded by the printer to the plaintiff's solicitor, who should examine it carefully with the proof sheets; and a sufficient number of copies should be printed off for the purposes of the sale, and distributed in the same way as in sales in ordinary cases: (*Ib.* 431.)

VII. AS TO THE AGREEMENT WHERE THE SALE IS MADE BY
PRIVATE CONTRACT.

Same care necessary in preparing agreement or conditions of sale.—The same care and accuracy is necessary in preparing the terms of the agreement, where the sale is to take place by private contract, as in framing the conditions where the property is to be sold by public auction.

The heading.—It should commence with the date, name, and description of the parties, by which the one binds himself and his representatives to the other party and his representatives for the due performance of the contract: (see the form of heading of a contract, 1 Con. Prec., Part I., No. III., p. 12, 2nd edit.)

Where the agreement is entered into by an agent.—If the agreement is entered into by the vendor's agent, it should be stated that he acts in that capacity; as—

"By A. B., of &c., his attorney [or agent] lawfully appointed in that behalf."

And if the agreement is to be entered into by the agent for the purchaser, he should be described as—

"By C. D., of &c., his attorney [or agent] lawfully constituted for that purpose."

Practical suggestions as to how a contract should be penned. The contract should state the agreement on the part of the vendor to sell the property to the purchaser, in which clause it is also usual to insert a description of the property, which must be accurately done, as a wilful misdescription in this respect will be equally fatal in a contract as when contained in the conditions of sale. If the property is to be sold subject to any leases, or other existing charges or incumbrances, they should be correctly set out: (see forms of this kind, 1 Con. Prec., pp. 14 to 16 inclusive, 2nd edit.) The

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undertaking on the part of the vendor to deliver an abstract, and deduce a good title, is also generally included in this clause; as also that the vendor will convey on approval of the title: (see the form, 1 Con. Prec., Part I., No. III., clause 1, p. 12, 2nd edit.)

As to the agreement on the part of the purchaser.—The contract should then contain the agreement on the part of the purchaser to pay the purchase money on the execution of the conveyance (*Id. ib.* clause 2, p. 14), and if a deposit has been paid by the purchaser, it should be here mentioned, as also the amount of such deposit.

Usual stipulations as to title.—The vendor and purchaser should then enter into a mutual agreement with each other for the due observance of their respective parts of the contract (see the form, *Id. ib.* clause 3, p. 15), the terms of which are usually similar to those contained in conditions of sale (that is to say); by whom the expenses of disentailing deeds, acknowledgments of married women, the incidental expenses attending the production of title deeds, getting in of outstanding legal estates, obtaining probate or letters of administration, all of which would otherwise fall upon a vendor, are to be defrayed; but it is usual to agree that they shall all be paid for by him: (*Id. ib.*)

When recitals in ancient documents are to be conclusive.—It is then usual to stipulate that recitals contained in ancient documents or court rolls shall be conclusive evidence of the recited facts; and that all doubts respecting seisin, or identity, or boundaries of property, not appearing on the deeds, shall be removed by a declaration in pursuance of the act for the substitution of declarations for oaths: (*Id. ib.* clause 4, p. 16.)

As to the preparation of purchase deed.—It then ought to say by whom the purchase deed is to be prepared, although it commonly follows the general practice, by directing that it shall be done by the purchaser's solicitor, and be settled and approved of on the part of the vendor and purchaser by their respective solicitors.

Clause for rescinding contract.—Then comes the clause for rescinding the contract. This may be penned in two ways: it either gives the purchaser power to rescind the contract in case the vendor shall fail to produce a good

title within the time specified in the contract (see the form, 1 Con. Prec., Part I., No. III., clause 6, p. 17, 2nd edit.); or it authorizes the vendor to do so upon the purchaser's failing to perform his part of the agreement (see the form, 1 Con. Prec., Part I., No. I., clause 9, p. 7, 2nd edit.); or the vendor may be empowered to vacate the sale in case the purchaser shall object to the title, or require any evidence respecting it the vendor may be unable or unwilling to supply: (see the form, 1 Con. Prec., Part I., p. 4, 2nd edit., *in notis.*)

Time may be made part of the essence of the contract.—It may also be stipulated that time may be made part of the essence of the contract at the option of either vendor or purchaser, which it has been decided may now be made binding in equity as well as at law: (*Keen v. Stuckley*, Gilb. Eq. Cas. 155; *Lloyd v. Collett*, 4 Bro. C. C. 469; *Levy v. Lindo*, 3 Mer. 81; *Whitby v. Cottle*, 1 Turn. 79; *Hudson v. Bertram*, 3 Mad. 440; *Reynolds v. Nelson*, 6 ib. 18; *Boehm v. Wood*, 1 Jac. & Walk. 419.)

Propriety of inserting a clause for rescinding contract in case vendor is unable to make a title to some portion of the property.—Sometimes a clause is inserted authorizing a purchaser to rescind the sale in case the vendor shall fail to make a good title to the whole of the premises. This stipulation is sometimes a very important one for a purchaser whose principal object in entering into the contract may possibly be to obtain that very portion of the property to which the vendor is unable to make a title. It is true a vendor would not, generally speaking, as we have already remarked, be allowed to compel the purchaser to complete the sale, even with any amount of compensation he might offer him, where the former is unable to make a title to a lot complicated with the rest, and essential to their enjoyment; still, it will be the more prudent course for the purchaser's solicitor to insist upon the insertion of a clause of this kind in the contract, where he has the slightest ground for supposing that such a question may be likely to arise.

Stipulation that if vendor is unable to make a title to the whole property, purchaser is to be at liberty to rescind the contract.—The following clause will be found well adapted for enabling a purchaser to vacate the contract in case the vendor is unable to make a title to the whole property:—

“But it is nevertheless agreed, that if the said (vendor) shall fail to make a good title, at the time hereinbefore appointed, to the whole of

the premises hereby contracted for, or the same shall contain a lesser quantity than (*a certain specified number*) acres statute measure [or *where the subject matter of sale is a manor*, in case the said manor shall prove to be a manor by reputation only], or in case the said premises, or any portion of them, shall not prove to be of freehold tenure, then, for all, any, or either of the causes aforesaid, the said (*purchaser*) shall be at full liberty to rescind the contract, which from thenceforth shall be null and void to all intents and purposes whatsoever."

As to special stipulations.]—The above are the ordinary clauses used in an agreement for the sale of real property; but it often happens that even more special clauses are required in an agreement upon a sale by private contract than in the conditions upon a sale by auction, arising from some particular circumstances connected with the title, which, as we have before remarked, render it ineligible to offer the property for sale by public auction, but afford no objection whatever to the treaty for a purchase by private contract.

Clauses in conditions of sale equally applicable to agreements.]—Almost all, if not every one, of the clauses we have already noticed with respect to conditions of sale, will, under corresponding circumstances, be equally applicable to agreements to sell by private contract, and may be adapted for the like purpose, by merely substituting the names of the parties in the agreement for that of their respective characters of "vendor" and "purchaser," in which they are described in the conditions, although there is no objection whatever to their being described in the characters they fill instead of their own proper names in an agreement, as well as in conditions of sale. But in addition to the several stipulations we have already mentioned (*ante*, p. 19), there are others which are often inserted in agreements, which are not so well adapted to, and are consequently rarely if ever introduced into, conditions of sale. Amongst these may be enumerated arrangements as to the time and mode of the payment of the purchase money; as, for example, that the whole or some part of the consideration shall be an annuity, or that some portion of the purchase money shall remain secured upon a mortgage of the premises, or that it shall be paid by instalments, or by bills of exchange, or promissory notes, or be secured by bond; and in other instances no particular time is appointed for payment, but it is agreed that, until such payment is made, a purchaser shall pay interest on it, for which the vendor is to have a lien on the purchased property, the purchaser in the meantime to be let into the possession and receipt of the rents and profits of the estate.

Of the vendor's lien on the estate for the unpaid purchase money.]—Independently, however, of any express agreement, a vendor who delivers possession of the estate to a purchaser has always a lien upon it for the amount of his unpaid purchase money (*Herle v. Botelers*, Cary's Cha. Rep. 25; *Chapman v. Tanner*, 1 Vern. 267; *Gibbons v. Baddull*, 2 Eq. Ca. Abr. 682 (n); *Coppin v. Coppin*, 2 P. Wms. 294; *Fawell v. Heelis*, Ambl. 724; *Hennand v. Moore*, 1 Eden, 237; *Walker v. Prestwick*, 2 Ves. 622; *Macreth v. Symmons*, 15 Ves. 129; *Selby v. Selby*, 4 Russ. 448); not only as against the purchaser himself and his representatives, and all persons claiming as volunteers under him, but even against purchasers for valuable consideration, where it can be shown that the latter had notice that the purchase money was unpaid (*Hennand v. Moore*, *supra*), although it will be otherwise in the case of purchasers without such notice, whose estate under the purchase deed will supersede the vendor's lien upon the lands: (*Cator v. Earl of Pembroke*, 1 Bro. C. C. 301.) Still, to have this operation, the estate must be actually conveyed, for between equal equities, the rule being, *qui prior est tempore potior est jure*, a subsequent purchaser, who has not obtained a conveyance of the legal estate, cannot postpone the vendor's lien: (*Ex parte Wright*, 49; *Cross on Lien*, 100; *Winter v. Lord Anson*, 1 Sim. & Stu. 434; *S. C.* 3 Russ. 488.) As between the immediate vendor and purchaser it will make no difference to the lien of the former whether the estate be actually conveyed or only contracted for, as the lien will equally attach in either case, and this, notwithstanding the full amount of the consideration money is expressed to have been paid in the body of the deed, and the receipt is duly indorsed, signed, and witnessed: (*Coppin v. Coppin*, *supra*; *Macreth v. Symmons*, *supra*; *Pollexfen v. Moore*, 3 Atk. 274; *Charles v. Andrews*, 9 Mod. 152.)

Of purchaser's lien on the property.]—And as the vendor, on the one hand, has a lien on the property sold for his unpaid purchase money, so, on the other, the vendor has a similar right where he pays his money before the property has been regularly conveyed to him, or the contract is rescinded, either from the inability of the vendor to confer a good title, or any other sufficient cause (*Lacon v. Mertins*, 3 Atk. 1; *Oxenden v. Esdaile*, 2 You. & Jerv. 493, 3 ib. 362); but not, it seems, where the contract is of such an illegal or immoral nature as would induce a Court of Equity to

refuse specific performance of it: (*Ewing v. Osbaldistone*, 2 Myl. & Cra. 88.)

How vendor's lien may be destroyed.]—This lien of vendor's will, however, be destroyed, if he takes a distinct and independent security for his purchase money; as a mortgage of part of the lands sold (*Bond v. Kent*, 2 Vern. 281; *Capper v. Spottiswoode*, Tam. 21), or of another estate (*Nairn v. Prowse*, 6 Ves. 725); either of which acts, so far from affording any evidence that the vendor placed any reliance on his equitable lien, show, on the contrary, that he had abandoned it altogether for a security of another kind; but the latter presumption will be rebutted where the security taken is merely a personal one, as a bond (*Winter v. Lord Anson*, 3 Russ. 488, on appeal, reversing *Winter v. Lord Anson*, 1 Sim. & Stu. 434), bill of exchange, promissory note, or the like, in either of which cases the vendor's lien will continue so long as those securities remain undischarged (*Herle v. Botelers*, Cary's Cha. Rep. 35; *Gibbons v. Baddall*, 2 Eq. Ca. Abr. 682 (n); *Grant v. Wills*, 2 Ves. & Bea. 806; *Saunders v. Leslie*, 2 Ball & B. 515; *Ex parte Loaring*, 2 Rose, 59; *Hughes v. Kearney*, 1 Sch. & Lef. 132; *Blackburne v. Gregson*, 1 Cox, 90; *Lynn v. Chaters*, 2 Kee. 251); nor will the circumstance of the vendee's becoming a bankrupt in any way affect the vendor's lien upon the property: (*Ex parte Peake*, 1 Mad. 340.)

Vendor taking a pledge of stock will lose his lien on the lands.]—But it seems there is one kind of personal security that forms an exception to the above rule, a pledge of stock, which, it has been held, will discharge the vendor's lien: (*Nairn v. Prowse*, 6 Ves. 752.)

Whether concurrence of vendor with purchaser in borrowing money on the property will destroy the lien.]—If a purchaser borrows part of the purchase money, and pays it to the vendor, leaving the rest unpaid, and the conveyance is made to the purchaser, stating the transaction, and giving thereupon security to the lender, the concurrence of the vendor will preclude him from any lien for the remainder of the purchase money, if not against the purchaser, certainly against the mortgagee: (*Cood v. Pollard*, 9 Pri. 544; *id. ib.* 109, *sub nom.* *Cood v. Cood*.)

As to interest on purchase money.]—In sales by private contract, it is also common to enter into some special agree-

ment with respect to the payment of interest on the purchase money.

As to arrangements where the payment of purchase money is postponed, and purchaser is to be let into possession in the interval.—The circumstances under which a purchaser will render himself liable to such payments, in the absence of any express agreement or stipulation to the contrary, we have already considered, as also how a clause should be penned so as to insure such payment to the vendor in case the purchase money shall not be paid to him at the appointed time (*ante*, p. 38.) It sometimes, however, does occur, where some time must necessarily elapse before the title can be perfected, and the purchaser is desirous of being let into possession in the interim, that a cautious vendor, notwithstanding the above-mentioned stipulation, added to his equitable lien upon the property for his unpaid purchase money, has great reluctance to allow the purchase money during that interval to remain in the hands or under the immediate control of the purchaser; whilst the latter, although he has the money ready and lying unproductive in his hands, is equally unwilling to pay it over to the vendor, until the latter has shown a good title and made an actual conveyance of the property in pursuance of the terms of his contract. Whenever, under circumstances like these, objections of this kind are raised, they may, with the concurrence of both parties, be set at rest by extending the clause we have before referred to (*ante*, p. 37) a little further, and stipulating that the purchase money shall be invested in the names of mutual trustees, both of vendor and purchaser, who are to invest the moneys and pay the interest to the vendor from the time the purchaser is let into possession until the completion of the contract, or in case of such contract being rescinded on account of the vendor's being unable to confer a good title, or any other sufficient cause, to repay the principal, but without interest, to the purchaser. The following form may be found adapted to the purpose:

"But if the completion of the purchase shall be delayed, for any cause, beyond the day of , it is hereby mutually agreed that the said purchase money, or sum of £ , shall be invested in the Three per Cent. Consols, in the names of two trustees, one to be nominated by and on behalf of the said (*vendor*), and the other by and on the behalf of the said (*purchaser*), which said trustees shall stand possessed of the said stock, and shall receive the dividends and annual produce thereof, and pay over the same to the said (*vendor*), until the completion of the said contract; the said (*purchaser*) to be let into the

possession and receipt of the rents and profits of the said premises from the time at which his said purchase moneys shall have been so invested as aforesaid; and upon the completion of the said contract, the said trustees shall transfer the said stock unto and into the name of the said (*vendor*), for his own absolute use and benefit, or otherwise dispose of the same as he shall direct; but if the said contract shall be rescinded, either on account of the inability of the said (*vendor*) to confer a good title, or any other sufficient cause, then the said trustees shall, immediately upon the said purchaser's delivering up the possession of the said premises, transfer the said stock unto and into the name of the said (*purchaser*), for his own absolute use and benefit, or otherwise dispose of the same as he shall direct, who shall from thenceforth be entitled to all future dividends to accrue due thereon; but all dividends previously received shall be retained by the said (*vendor*); the said (*purchaser*) to be also entitled to retain all rents and profits of the said premises received by him up to the time upon such contract being so rescinded as aforesaid."

As to contingent estates and interests which yield no immediate profit.—In the instance of a sale of such estates and interests as may never be executed in possession, or yield no profit in the intermediate time, a clause very similar to one just recommended will prove useful. By the latter, it should be agreed that the purchase moneys shall be paid into the hands of trustees for both parties, and be by such trustees invested, and so remain until the contingent estate or interest either becomes absolute, or fails of effect altogether. Suppose, for instance, lands are limited to A. for life, remainder to B. for life, remainder to C. in fee, and B. sells his interest to D.; in this case, if B. should die in A.'s lifetime, his estate in remainder would determine also, and D.'s chance of enjoyment of the property would be at an end. In order, therefore, to meet a case of this kind, it might be arranged that the purchase money shall be paid and invested as above directed, and that upon the estate in remainder becoming vested in possession, and a good title and conveyance made to D., the principal and intermediate accumulations shall be paid to B., but that if B.'s estate determines in A.'s lifetime, then the principal and accumulations to be paid over to D., and the contract to be considered at an end. Arrangements of this kind under similar circumstances are certainly not likely to occur very often in practice, because persons rarely sell reversionary interests unless they are in immediate want of the purchase money; but there are other instances where an arrangement of this kind may be often advantageously resorted to, and this is with respect to the next presentation to an advowson, where such right is vested in a tenant for life, which right may be lost by his death, either in the life-

time of the incumbent, or the remainder man. The following clause may be applied for this purpose :

"AND WHEREAS the said (*vendor*) is only entitled to an estate for life in the said advowson, so that the said next presentation to the same hereby contracted to be sold may altogether fail of effect by his death in the life of the said (*name of incumbent*) to obviate which difficulty, as far as the nature of the circumstances will permit, it is mutually agreed between the said (*vendor*) and (*purchaser*) that the said purchase money or sum of (*amount of purchase money*) shall be invested in some of the public stocks or funds in the joint names of two trustees, one to be nominated by and on the behalf of the said (*vendor*) and the other by and on behalf of the said (*purchaser*) ; which said trustees shall stand possessed of the said trust moneys, stocks, funds and securities, and shall receive the interest, dividends, and annual produce thereof, and invest the same so and in such manner as that the same may accumulate in the nature of compound interest, until the avoidance of the said advowson by the decease, resignation, or deprivation of the said (*incumbent*), or the said next presentation so contracted to be sold to the said (*purchaser*) failing of effect by the death of the said (*vendor*) in the lifetime of the said (*incumbent*.) And, upon the happening of the former event, the said trustees shall pay over or transfer the said trust moneys, stocks, funds, and securities, with all intermediate accumulations, unto the said (*vendor*), his executors, administrators or assigns ; but on the said next presentation so failing of effect as aforesaid, shall pay over or transfer the said trust moneys, stocks, funds, and securities unto the said (*purchaser*), his executors, administrators or assigns."

How to provide for the event of present incumbent becoming a bishop.]—In case of sales of next presentations to an advowson, it has been usual to provide against the contingency of the present incumbent being promoted to a bishopric, in which case the next right of presentation would become vested in the Crown, but which, it seems, would not have the effect of avoiding a contract which purports to be for the next presentation, for the grantee will still be entitled to present to the next vacancy: (*Calliard v. Froward*, 2 H. Blackst. 324 ; S. C. in error, 6 T. R. 439.) But in order to get clear of every difficulty on questions which may happen to arise upon the matter, it is better to insert an express stipulation, either that a right of presentation so devolving upon the Crown shall not affect the contract, or that upon the happening of such an event, the purchaser shall be entitled to a deduction of some specified amount of the purchase money.

As to contracts by tenants in tail, who are unable to obtain the consent of the protector.]—Provisions partaking of the character of those just before mentioned may also be employed in the case of dispositions by tenants in tail, who

are unable to confer an absolute estate for want of the consent of the protector of the settlement, by which it may be arranged that some portion of the purchase moneys may be paid over to trustees, and invested upon trust, to be paid either to the tenant in tail or his representatives, on the title being perfected; or be paid over to the purchaser, or his representatives, in case the title shall not be so perfected within some specified time.

As to indemnity against wife's title to dower.—In like manner, if a vendor is unable to procure his wife to release her right of dower, it may be agreed that one third of the amount of the purchase money shall be paid to trustees to be invested in like manner as before mentioned, and to be paid over, with the accumulations, to the vendor, in the event of his surviving his wife, or to be repaid, with all the accumulations, to the purchaser, in case the vendor shall happen to die in her lifetime, without having been able to get her to release her claim.

Where some of the conveying parties are under age.—In case any of the conveying parties are under age, an arrangement may also be made by which the purchaser is to be allowed to retain some portion of the purchase money until such parties attain their majority and duly execute the conveyance.

As to the liquidated damages clause.—A clause is often inserted in agreements, but very rarely in conditions of sale, by which each of the contracting parties binds himself to the other for the payment of a certain sum, in the nature of liquidated damages, for the due performance of his part of the contract (see the form, 1 Con. Prec., Part I., No. V., clause 10, p. 26, 2nd edit.), and whenever this is done, provided the clause is accurately penned, the entire sum specified may be recovered by action, without any power for the jury to reduce the amount; neither will a Court of Equity interpose for that purpose. But care must be taken to frame the clause in such a manner that no doubt can possibly be raised upon its construction. It ought to state explicitly that the sum is to be paid in the nature of liquidation damages, and not by way of penalty; for if the sum is stated to be paid by way of penalty only, the jury might then assess what amount they thought proper, because, in the case of a penalty, the degree of injury sustained is the guide to the jury in assessing the amount of damages

they should return a verdict for (*Smith v. Dickinson*, 3 Bos. & Pull. 630; *Barton v. Glover*, Holt N. P. C. 43; *Lowe v. Peers*, 4 Bur. 2229; *Crisdee v. Boulton*, 3 Car. & Pay. 240); whereas if a certain specified sum is agreed to be paid for liquidated damages, there the precise sum that is to be paid is in evidence before them, and they are bound to assess the damages accordingly, without any reference as to the degree of injury the plaintiff may have actually sustained by the breach of contract.

Payment of the penalty or liquidated damages does not dissolve the contract.—The payment of a sum of money, whether by way of penalty, or in the nature of liquidated damages, does not release the parties from the contract; for that they are still bound to carry out, and have not the option, by paying or tendering the penalty, to be released from its performance: (*Hobson v. Trevor*, 2 P. Wms. 183; *Christ's Hospital v. Pugh*, D. P. March 20, 1727; *Howard v. Hopkins*, 2 Atk. 371; *Parks v. Wilson*, 10 Mod. 518; *Chilliner v. Chilliner*, 2 Ves. 258; *Margrave v. Archbold*, 1 Dow. 107.)

VIII. DUTIES OF THE PURCHASER'S SOLICITOR PRIOR TO THE CONTRACT.

Duties of the purchaser's solicitor where the sale is by public auction.—The duties of a purchaser's solicitor prior to the contract, where an estate is to be sold by auction, is to look carefully through the conditions of sale, to see, first, whether or not they preclude a purchaser from requiring the production of such a title as will not only secure him the unmolested enjoyment of the purchased property, but also one that he may at any future time be able to compel a subsequent purchaser to accept; and, secondly, whether the conditions do not press unfairly on a purchaser, by obliging him to bear the burden of some of those incidental expenses connected with the transaction, which ought properly to fall upon the vendor's shoulders. Should either prove to be the case, the solicitor ought, in the first instance, to advise his client to avoid entering into any contract subject to such restrictive conditions; and in the other, should ascertain, as nearly as he can, what the probable amount of the undue proportion of the expenses the vendor designs to throw upon the vendee, which he must view in the same light as so much additional purchase money, and regulate his biddings accordingly.

Similar precautions necessary in settling the terms of contract as conditions of sale.—Precisely the same precautions as those we have just mentioned will be necessary on the part of a purchaser's solicitor settling the terms of the agreement, where the sale is made by private contract.

Where a vendor has a safe holding, although not a marketable title.—Another important subject to which a purchaser's solicitor may sometimes have to direct his attention is, where property, which has a defective title, would in all other respects prove an advantageous purchase for his client; and here it will be necessary for him to consider well whether, although not a marketable one, it may not be a perfectly safe holding title, and whether, if the property is subject to incumbrances, which cannot be removed, they are really of such a nature as materially to affect the ownership or enjoyment of the property. And where a vendor proposes to indemnify a purchaser against any losses or prejudice he may incur from a defective title, it will be requisite for the purchaser's solicitor to see not only that the nature of the indemnity is sufficient, but also that the vendor has the means and ability to carry it into effect.

With respect to defective titles to freehold estates, where they affect the actual possession, these frequently arise from estates tail having been ineffectually barred; as, where the entail has been barred by a fine, instead of suffering a recovery, in which case only a base fee will have passed determinable on the death and failure of issue of the tenant in tail; the same consequence also occurs where, under the new system of docking entails, a tenant in tail under a protected settlement has barred the entail without the protector's consent; which will only enable him to convey a similar base fee as a fine would have done previously. The safety of titles so circumstanced depends entirely upon the existence of the issue in tail. If they are numerous and healthy, so that there is every probability that some of them will survive the protector, and live to attain their majority, if the tenant in tail covenants, or has covenanted, that he or his issue will, when competent so to do by the death of the protector, or obtaining his consent, perfect the disentailing assurance by an absolute conveyance to the purchaser, under these circumstances the purchaser's risk would be inconsiderable; but the danger would increase in proportion as his children are few in number or unhealthy in constitution, and still more so if he has none, or unlikely ever to have any; as then the base fee must determine with his death; and if this

takes place in the protector's lifetime, the voidable estate becomes incapable of confirmation.

As to contingent and executory estates.—The like observations are also applicable to contingent or executory estates arising out of executory devises. Some of these are of most precarious tenure; as where an estate, although limited to a party in fee simple, is made determinable on some contingent event, which, from subsequent circumstances, must necessarily take place during the lifetime of persons in being. As, for example, where an estate is devised to a female and her heirs, with a limitation over in case of her death without leaving any children, or other issue living at the time of her decease, and she is become old and sickly, without issue and beyond the age of child-bearing, in which case her fee simple estate is no better than a very bad life estate; but the executory limitation over, although contingent in the eye of the law, is in reality equal to a vested estate in remainder expectant on a life interest limited to a previous tenant for life. But if, on the other hand, the lady were young and likely to have children, the chance of the executory devisee's succeeding to the property would be greatly reduced, and if many children were to be actually born, dwindled away to such a shadow of a chance as to be all but valueless to a purchaser.

In cases of property so situated, therefore, great care will be required to discover whether or not a safe or advantageous purchase may really be made; but which must be guided so much by the particular circumstances of each individual case, that it is impossible to lay down any precise rules upon the subject.

As to incumbrances which do not affect the occupation of the property.—With respect to incumbrances which do not interfere with the actual occupation of the property, as annuities, or rent-charges, legacies, or portions, a purchaser may not object to take a title subject to charges of this nature upon having a proportionate sum deducted out of the purchase money, or from being indemnified by the vendor against all the consequences of any such charges.

In cases of this kind great vigilance will be required on the part of the purchaser's solicitor to see that, in the former instance, an adequate reduction is made in the amount of the purchase money; and in the latter, that the indemnity given is an effectual one.

As to indemnities.—Sometimes a vendor proposes to indemnify the purchaser from incumbrances of this kind by his bond, or a deed of covenant; but neither of these can be relied upon as an adequate indemnity. They must, in every case, depend upon the solvency of the vendor's circumstances, which, though good enough at the time the indemnity is given, may afterwards fail altogether; and even if the vendor continues all his lifetime in affluence, his representatives may, after his death, get rid of all his assets, and thus deprive the purchaser of the sources from which the indemnity is to be derived.

The plan we have already suggested of placing some portion of the purchase moneys in the hands of trustees, to be applied in discharge, or as an indemnity against incumbrances, as we have previously noticed, is also a good plan for protecting a purchaser, and is particularly well adapted to those cases where the time of discharging those incumbrances has not yet arrived; as in the case of legacies, or portions charged on real estate to be paid to certain parties on their attaining twenty-one, or marriage, who are still under age and unmarried. A similar arrangement may also be made where the property is subject to an annuity or rent-charge, and the trustees should have a sufficient sum placed in their hands to meet all such expenses as the purchaser may incur on account of those charges. The objection generally is, that a vendor is oftentimes in want of all the purchase money for his own purposes, and therefore is unwilling to allow any portion of it to be applied in any other manner. To meet this difficulty, it may be arranged that the vendor shall convey other property belonging to him, if he has any eligible for the purpose, to trustees, in trust, in the first place, to discharge the incumbrances, and keep the purchased premises effectually discharged therefrom, and subject thereto in trust for the vendor.

Whole terms of the agreement should be reduced into writing.—Whatever the terms of the agreement may be, the solicitors on either side should see that they are carefully reduced into writing, and that nothing is to be left on the understanding that it will be carried into effect in the same manner as if a regular written agreement was duly entered into respecting it. And in case the negotiation is carried on by a correspondence by letters, it should be conducted in such a manner as that the terms proposed in the letters may be construed as treaty only, and not as an actual contract,

until the whole terms of it are finally arranged and concluded; for, as we shall by-and-by show, a contract may be established through the medium of a correspondence by letters, notwithstanding the writer of them may have looked for the execution of a more formal agreement; and some important terms, which ought to have formed part of it, are left out altogether.

CHAPTER II.

OF THE SALE.

I. OF SALES BY AUCTION.

II. OF SALES UNDER A DECREE.

1. How the sale is conducted, and the usual proceedings thereon.
2. As to the opening of the biddings.
3. Sales by private contract.

III. OF THE REQUISITES TO CONSTITUTE A VALID CONTRACT.

1. Of the operation of the Statute of Frauds upon contracts relating to the sale of real property.
 2. As to informal instruments.
 3. What will amount to a valid signature.
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I. OF SALES BY AUCTION.

Manner of conducting a sale by auction.—When property is sold by auction, the usual course of proceeding is either for the auctioneer, or the vendor's agent, to read over and explain the particulars and conditions of sale before the persons assembled. Several copies of the conditions ought also to be circulated about the room, in order that every one there may have an opportunity of inspecting them. The property is then put up for sale, either together or in separate lots, and upon a bidding being made, the auctioneer declares the amount of such bidding, until no further advance being offered, the lot is either knocked down to the highest bidder, or is bought in again on behalf of the vendor.

As to vendor's right to reserve biddings.—It is a frequent practice for the vendor to insert a reservation of a right to bid once in the conditions (*Jervoise v. Clarke*, 1 Jac. & Walk., 399); but a reservation of this right will not authorize

him to appoint a puffer to screw up the price (*Rez v. Marsh*, 3 You. & Jerv. 331; *Crowder v. Austen*, 3 Bing. 336); and such an unfair course of proceeding would afford sufficient ground for a purchaser to rescind the contract altogether: (*Howard v. Castle*, 6 T. R. 642; *Wheeler v. Collier*, Moo. & Malk. 123.) And where the estate is advertised to be sold without reserve, such sale would be void as against a purchaser if any person were to bid on the vendor's behalf: (*Meadows v. Tanner*, 5 Mad. 34; *Thornhill v. Haines*, 15 Mees. & Wels. 367.) Nor can a vendor employ more than one person to bid for him; for if he appoints two or more persons to do so, it will be considered as puffing, and vitiate the sale accordingly: (*Connolly v. Parsons*, 3 Ves. 625; *Twining v. Morrice*, 2 Bro. C. C. 26; *Smith v. Clark*, 12 Ves. 483; *Rez v. Marsh*, *supra*; *Crowder v. Austen*, *supra*; *Wheeler v. Collier*, *supra*.)

Purchaser using disparaging terms of property will be deprived of right to enforce specific performance.—And as a vendor employing puffers is precluded from enforcing a bidder to complete his purchase, so a purchaser who uses disparaging terms respecting the property in order to deter others from competing with him in the sale, will not only be thereby disabled from compelling a specific performance of the contract, or maintaining an action for its non-performance (*Fuller v. Abrahams*, 3 Bro. & Bing. 116; S. C., J. B. Moore, 316), but will also render himself liable to an action for the slander of the vendor's title: (*Cro. Jac.* 213; 3 Bla. Com. 124; *Lowe v. Harewood*, Sir W. Jones, 196; *Malachy v. Sulper*, 3 Bing. N. C. 383; S. C., Scott, 736.)

Of the requisites to constitute a valid contract in a sale by auction.—It has frequently been stated that the vendor's assent to the sale is signified by the knocking down of the hammer (*Payne v. Cave*, 3 T. R. 148); yet, however applicable this doctrine may be to the sale of goods, it is quite clear it cannot constitute a binding contract for the sale of real estate within the meaning of the Statute of Frauds (29 Car. 2, c. 3) until the auctioneer has attached his signature to the conditions (*Walker v. Constable*, 2 Esp. N. P. C. 659; *Buckmaster v. Harrop*, 7 Ves. 341; *Blagden v. Bradbear*, 12 Ves. 466), which, as the lawfully authorized agent both of vendor and purchaser, he is capable of doing (*Hine v. Whitehouse*, 7 East, 557; *Kemys v. Procter*, 3 Ves. & Bea. 57; *Emerson v. Heelis*, 2 Taunt. 38; *White v. Procter*, 4 ib. 209; *Heyman v. Neale*, 2 Camp. N. P. C. 337; *Paul*

v. Simes, 6 Car. & Pay. 506; *Farmer v. Robinson*, 2 Camp. N. P. C. 339; *Gale v. Wells*, 1 Car. & Pay. 388; *Trueman v. Loder*; 3 Per. & Dav. 267), and whose appointment it has been determined need not be by writing: (*Weller v. Hudson*, 5 Vin. Abr. 524; *Rucker v. Cammeyer*, 1 Esp. N. P. C. 105; *Coles v. Tregothic*, 9 Ves. 234; *Barry v. Lord Barrymore*, 1 Sch. & Lef. 28.) The usual practice, as we have remarked in the preceding chapter, is to have a short form of contract attached to the conditions of sale, which, when signed by the necessary parties, becomes thereby embodied with the terms of the conditions, the whole together forming the subject-matter of one entire contract: (*Clinan v. Cooke*, 1 Sch. & Lef. 22; *Allen v. Bennett*, 3 Taunt. 139; *Cooper v. Smith*, 15 East, 103; *Shippey v. Derrison*, 5 Esp. N. P. C. 190; *Richards v. Porter*, 6 B. & C. 437; *Dobell v. Hutchinson*, 3 Ad. & Ell. 355; see also *Brodie v. St. Paul*, 1 Ves. 326; *Tawney v. Crowther*, 3 Bro. C. C. 318; *Hinde v. White*, 8 East, 558; *Fowle v. Freeman*, 9 Ves. 351; *Rose v. Cunningham*, 11 Ves. 556; *Price v. Leyburn*, Gow. 109.) But notwithstanding the above mentioned is the proper and most regular course of proceeding, a simple entry of the purchaser's name by the auctioneer, referring to the lot for which he bids, will be a sufficient signing on behalf of the purchaser to be binding on him, as will also the auctioneer's signature to a receipt for the deposit, if it refers sufficiently to the contracting parties and subject-matter of sale, or to the conditions, to show the nature of the contract.

Bidding may be retracted at any time before the lot is knocked down.—A bidding is not completed until the falling of the auctioneer's hammer, and may consequently be retracted at any time before the lot is actually knocked down (*Payne v. Cane*, 3 T. R. 148; *Roullege v. Grant*, 4 Bing. 653); but such retraction must be made in a tone sufficiently audible for the auctioneer to hear, or by such gestures as he can readily understand, otherwise such retraction will, like a mere mental reservation, amount to nothing, and the bidder still be held to his bargain: (*Jones v. Nanney*, 3 Camp. N. P. C. 385; 13 Fri. 102; S. C., M'Clell. 39.)

Auction duties, now repealed.—The auction duties would formerly have attached upon the signing of the contract, and these, in the absence of an express stipulation to the contrary, must have been discharged by the vendor, although it was legal for the parties to enter into an arrangement for paying it in any other manner: (*Malins v. Freeman*, 4 Bing.

N. C. 395.) But these duties, though often evaded, proved a heavy clog to sales of this kind, and are now happily done away with, and it is to be hoped never again to be revived: (stat. 8 Vict. c. 15.)

As to the payment of the deposit.]—The conditions of sale usually stipulate that a deposit shall be paid, either into the hands of the auctioneer or the vendor's agent; but in cases of the sale of real property, the more usual practice is to direct that the deposit shall be paid to the vendor's agent. If paid to the auctioneer, he is considered as holding it as a stakeholder both for the vendor and purchaser; and if he pays it over to the former, without the direction of the latter, he becomes personally responsible for its return in case the title should prove defective: (*Jones v. Edney*, 3 Camp. N. P. C. 285.) Still, under such circumstances, the auctioneer may support an action for its recovery against the vendor, but he will not be entitled to recover the costs of defending an action brought by the purchaser for the recovery of it, unless the vendor himself has authorized such defence: (*Spurrier v. Elderton*, 5 Esp. N. P. C. 1; *Burrough v. Skinner*, 5 Bur. 2659; *Ambrose v. Ambrose*, 1 Cox, 194; *Gray v. Gutteridge*, 1 Man. & Ry. 614; *Duncan v. Cafe*, 2 Mees. & Wels. 244.)

How the auctioneer may best protect himself in case of dispute respecting the deposit.]—The inconveniences an auctioneer may be exposed to from paying over the deposit to a vendor, are therefore best guarded against by providing in the conditions, as we have just before noticed, that it shall be paid into the hands of the vendor's agent; but in the absence of any express provision to the above effect, the auctioneer has the power, in case both vendor and purchaser claim the deposit, to protect himself under the Interpleader Act, 1 & 2 Will. 4, c. 58, or he may obtain an injunction in equity upon paying his deposit into court; but to do this he must pay in the full amount of deposit; for, should he insist upon retaining his own commission, or any other claims he may consider himself to be entitled to out of it, he will thereby debar himself from all equitable assistance: (*Farebrother v. Prattent*, 1 Dan. 64; *Nerrot v. Harris*, ib. 68 (n.); *Mitchell v. Hayne*, 2 Sim. & Stu. 63.) Neither can an auctioneer protect himself under the Interpleader Act where he sells the property by private contract after the auction is over, although it be sold subject to the conditions of sale: (*Austin v. Brown*, 15 L. T. Rep. 72.)

Auctioneer not generally liable to pay interest on deposit.—Being in the nature of a stakeholder, and so bound to produce the deposit money at any time it may be called for, the auctioneer is not liable to the payment of any interest for it whilst it remains in his hands; nor, it seems, will it make any difference if the vendor were (without the purchaser's concurrence) to give the auctioneer notice to invest the money in Government securities, and although interest may actually have been made of it: (*Harrington v. Hoggart*, 1 B. & Ad. 577; see also *Lord Salisbury v. Wilkinson*, 8 Ves. 48.)

What will render auctioneer liable to payment of interest on deposit.—To make an auctioneer liable for interest, it must appear—first, that the contract on failure of the condition has been rescinded:—secondly, that a demand of deposit has been made, and a refusal to return it (*Lee v. Munn*, 8 Taunt. 55); and even then, according to the opinion expressed by Burrough, J., in *Curling v. Shuttleworth* (9 Bing. 134), it must be proved that the auctioneer actually made interest of the money.

Propriety of entering into some arrangement as to the investment of deposit where delay is likely to occur in completing purchase.—When, therefore, the deposit is considerable, and some time must necessarily elapse before the purchase is completed, it seems advisable to enter into some arrangement with respect to the disposal of the deposit in the interim; as, that it shall be invested in the funds, or paid into the hands of some bankers to be agreed upon between the parties, who are to allow interest for the same as long as it remains in their possession.

Auctioneer giving credit to a purchaser renders himself personally liable for the amount.—An auctioneer who, without the authority of his employer, gives credit to a purchaser for the deposit, or any other moneys in respect of the purchase, will render himself personally liable to make good all losses thereby incurred; and he will also be responsible for any securities he may take from a purchaser; such as bills of exchange, promissory notes, or the like; nor has he any authority, under common conditions, to receive more money than the amount of the deposit: (*Sykes v. Giles*, 5 Mees. & Wels. 645.)

Auctioneer not naming his principal renders himself personally liable.—An auctioneer should always name his

principal, otherwise he becomes personally responsible if it should turn out that he has not the means of satisfying the contract (*Hanson v. Roberdeau*, Peake, N. P. C. 120); and he must also be careful to give his own name, as the act of 8 Vict. c. 15, directs the auctioneer expressly, under a penalty of 20*l.*, to suspend or affix, before he shall commence the sale, a ticket or board containing his full Christian and surname, and place of residence, in some conspicuous place in the room or place where the auction is held, so that all persons may easily read the same: (s. 7.)

Losses incurred by the insolvency of the auctioneer must be borne by the vendor.—Any losses that may be incurred during the progress of the sale in consequence of the auctioneer becoming insolvent, must be borne by the vendor, whose agent he properly is for every purpose connected with the auction, and appointed by him for that very purpose; whilst, as far as the purchaser is concerned, an auctioneer can only be considered as having a kind of special authority to sign such purchaser's name to the bidding. In every other respect he is the agent of the vendor, by whom he is selected, under whose authority he acts, and who alone can be supposed to have reposed any confidence in him: (*Brown v. Fenion*, 14 Ves. 144; *Benjamin v. Porteous*, 2 H. Blackst. 590; *Sanderson v. Walker*, 13 Ves. 601.)

As to the remuneration for the auctioneer's services.—The remuneration which an auctioneer is to receive for conducting a sale may be regulated either by a special contract between him and his employer, or, in the absence of such agreement, to a fair *quantum meruit* for his services: (*Malby v. Christie*, 1 Esp. N. P. C. 430.) In special agreements, the auctioneer usually receives a certain per centage by way of commission, but this claim can only be supported where there is an express agreement to that effect, in the absence of which he will be entitled to remuneration for his services only, the amount of which will be determined by the usage of trade (*Eicke v. Meyer*, 3 Camp. N. P. C. 412); and where it can be shown that a particular commission is commonly charged, and that the seller was aware of this custom, that would in most cases afford a fair and reasonable guide as to the amount of remuneration. But if the payment is dependent upon a contingency, it cannot be recovered until such contingency actually takes place: (*Winter v. Mair*, 3 Taunt. 531; *Roberts v. Jackson*, 2 Stark. N. P. C. 225; *Bull v. Price*, 7 Bing. 237; S. C., 5 Moo. & Pay. 2.)

Auctioneer has a lien on deposit.—If the auctioneer conducts the business properly, he has a lien not only on the deposit, but also on any other goods or effects of the vendor in his possession for his commission and expenses: (*Mann v. Shefner*, 2 East, 259; *Curtis v. Barclay*, 5 B. & C. 141; see also *Drinkwater v. Goodwin*, Cowp. 251.)

If negligent, entitled to no remuneration for his services.—But if, on the other hand, he is guilty of neglect, whereby his employer incurs an injury, he will be entitled to no remuneration whatever for his services: (*Denew v. Deverall*, 3 Camp. N. P. C. 451; *Jones v. Nanney*, 13 Pri. 76; *Hamond v. Holliday*, 1 Car. & Pay. 384; *White v. Chapman*, 1 Stark. N. P. C. 113; *Hurst v. Holding*, 3 Taunt. 32.)

II. OF SALES UNDER A DECREE.

1. How the sale is conducted, and the usual proceedings thereon.
2. As to the opening of the biddings.
3. Sales by private contract.

1. *How the sale is conducted, and the usual proceedings thereon.*

Sale, how conducted.—Where a sale is made under a decree, if it takes place in London, it is generally held either at the Auction Mart, at Garraway's, or at the Gray's Inn Coffee-house; and when held in the country, at some place in the vicinity of the property: (Ayck. Pract. 431, 5th edit.) Formerly, if the sale was held in London, it was conducted by the Master's clerk, and if in the country, by some person appointed by the Master for that purpose: (75th Order, 1828.) By a subsequent Order, when any property is directed to be sold before a Master, the Master is authorized to order the same to be sold at such place, either in town or country, and by such person as he may think fit (1st Order, 6th July, 1851); which power may now be exercised by the judge at chambers: (58th Order, 16th Oct. 1852; Ayck. 432, 5th edit.)

How the biddings are conducted.—At the sale each bidder signs his name and place of abode to the sum he offers, in a bidding paper prepared by the auctioneer and attached to the conditions of sale; and if he buys as an agent, he should so describe himself: (1 Turn. Pr. 129; Ayck. Pr. 432, 5th edit.) The highest bidder is declared to be the purchaser in the

same manner as in ordinary sales by auction, although in fact he does not, as we shall hereafter point out, actually become so until the certificate or report of the chief clerk is signed and adopted by the judge. If a reserved bidding has been filed, and no person bids a higher sum, the auctioneer declares the lot not sold, but bought in by the person interested in the estate: (Ayck. 432, 5th edit.)

Auctioneer, at conclusion of sale, should make out affidavit verifying the same, when judge's clerk will prepare certificate.]

—When the sale is concluded, the auctioneer should make out an affidavit verifying the biddings, and the signatures of the highest bidders for the lots, which affidavit must be afterwards returned, together with the particulars and conditions of sale, and the biddings taken at the sale, which should be exhibited and annexed to the affidavit; and the judge's clerk will thereupon prepare a certificate or report of the sale, which may be obtained and filed as hereinafter directed: (Ayck. 432, 5th edit.)

As to the auctioneer's remuneration.]—The usual practice is for the vendor's solicitor to enter into some arrangement with the auctioneer as to the remuneration he is to receive for his trouble, and not a per centage on the purchase money, and when the amount has been agreed upon, it must, prior to the auctioneer's being appointed, be submitted to the judge's clerk for approval: (Ayck. 432, 5th edit.)

As to the deposit.]—With respect to the deposit, the Master is at liberty to fix the amount, and to appoint some person to receive it, and, if so required, shall give security to account for the same in such manner as the court shall direct, and such person shall within such time as the Master shall appoint, and without any special order for the purpose, pay the money he shall so receive in such manner as the court shall have directed with respect to the moneys to arise from the sale: (3rd Order, July, 1851.) And the power conferred upon the Master by this order may now be exercised by a judge in chambers: (58th Order, 16th October, 1852.)

Proceedings formerly adopted to get the Master's report confirmed.]—The practice formerly was for the purchaser to obtain a confirmation of the Master's report of his being the purchaser, which report was then filed, and an office copy delivered to him. The next step was to get this report

confirmed *nisi* (Fowl. Pract. 307; 2 Smith Pract. 1842, 2nd edit.), which was done either by petition or by motion; and on the eighth day after the expiration of the order *nisi*, and of a certificate obtained at the registrar's office of no cause having been shown to the contrary, the order *nisi* might have been made absolute: (2 Smith Pract. 186, 2nd edit.) And where the parties were willing to consent to the arrangement, the order *nisi* might have been altogether dispensed with, and the report confirmed absolutely in the first instance, by the purchaser's presenting a petition of course to the Master of the Rolls, praying for an absolute confirmation of the report.

Alterations in practice effected by recent enactments.]—The practice in this respect has, however, lately undergone a complete alteration, in consequence of the changes effected by the 15 & 16 Vict. c. 80, s. 32, by which it is enacted that the directions to be given by the Master of the Rolls, or any Vice-Chancellor, for or touching any proceedings before his chief clerk, shall require no particular form, but the result of such proceedings shall be stated in the shape of a short certificate to the judge, and shall not be embodied in a formal report, unless in any case the judge shall see fit so to direct.

Modern practice in case of sales.]—In the case of a sale, therefore, the present practice is for the judge's clerk to prepare the certificate or report of the sale we have previously alluded to (*ante*, p. 83), which may be made in a form similar to the one set forth in schedule E. to the Orders of 16th Oct., 1852, with such variations as the case may require: (Ayck. 432, 443, 5th edit.) When the form is so prepared and settled, it is to be transcribed by the solicitor prosecuting the proceedings, in such form and within such time, as the chief clerk shall require, and is then to be signed by the chief clerk at an adjournment for that purpose. But where, from the nature of the case, the certificate can be drawn and copied in chambers whilst the parties are present before the chief clerk, the same shall be then completed and signed by him without any adjournment. (*Ib.*)

Opinion of judge thereon.]—The same statute also enacts that—

“No exceptions shall be made to any certificate or report of the chief clerk, although signed and adopted by the judge; but any party shall, either during the proceedings before such chief clerk, or within such time after such proceedings shall have been concluded,

and before the certificate or report shall have been signed and adopted, as the Lord Chancellor shall by any general order direct, be at liberty to take the opinion of the judge upon any particular point or matter arising in the course of the proceedings, or upon the result of the whole proceedings, when it is brought by the chief clerk to a conclusion." (sect. 38.)

The time for taking this opinion of the judge is to be four clear days after the certificate or report shall have been signed by the chief clerk (47th Order, 16th October, 1852); and any party desirous to take such opinion is to obtain a summons for such purpose within four clear days after the certificate or report shall have been signed by the chief clerk: (48, *id.*)

Judge approving of certificate will sign and adopt the same.]—When the judge shall approve of the certificate or report, he shall sign the same in testimony of his adopting the same: (15 & 16 Vict. c. 80, s. 32.) But in cases where the court directs the computation of interest, or the apportionment of any fund, which is to be acted upon by the accountant-general, or any other person, without any further order from the court, the order by the court may direct such computation or apportionment to be made by one of the chief clerks, and his certificate thereof to be acted upon accordingly, without the same being signed and adopted by the judge: (43rd Order, 16 October, 1852.) And in all cases where the certificate of the chief clerk is to be acted upon by the accountant-general without any further order, such certificate to be signed and adopted by the judge on the day after the same shall have been signed by the chief clerk, unless any party desiring to take the opinion of the judge thereon, obtains a summons for that purpose, before twelve o'clock on that day. The time for applying to discharge or vary such certificate, when signed and adopted by the judge, is to be two clear days after the filing thereof: (4th Order, 1st June, 1854; Ayck. 444, 5th edit.)

Chief clerk to submit certificate to judge for approval.]—If at the expiration of four clear days after the report shall have been signed by the chief clerk, if no party has in the meantime obtained a summons to take the opinion of the judge thereon, the chief clerk is to submit the certificate or report to the judge for his approval, who may, if he approve the same, sign such certificate or report accordingly: (49th Order, 16th October, 1852.) ♦

At what time judge may sign and adopt certificate.—In the interval between the sittings after any term, and the commencement of the sittings before or at the beginning of the next ensuing term, any judge of the court may sign and adopt any certificate made by the chief clerk of any other judge. But in all cases in which any judge signs and adopts a certificate made in pursuance of an order made by any other judge, it is to be expressed that he does so for such other judge, and such certificate shall in all future proceedings be deemed to be signed and adopted by the judge by whom it is signed and adopted, save that no application to discharge or vary such certificate is to be made to the judge for whom the same is signed and adopted, without the leave of the judge by whom it has been signed and adopted; and the judge by whom it has been signed and adopted is to have the same power to discharge or vary the certificate, as he would have had if it had been made in pursuance of an order made by himself: (Order, 26th July, 1853.)

Fees to be paid upon report or certificate.—The fee for every report or certificate, and which is paid by means of a stamp, is 1l.: (6th Order, 25th October, 1852.)

Certificate when signed and adopted by the judge to be filed.—When the certificate or report of the chief clerk has been signed and adopted by the judge, it may be filed in like manner as other reports (15 & 16 Vict. c. 80, s. 34), and such certificate or report when so signed, with the accounts, if any, is to be transmitted by the chief clerk to the Report Office, to be there filed: (50th Order, 16th October, 1852.) And certificates of the chief clerk made as mentioned in rule 43, and which, as we have already noticed, are not required to be signed and adopted by the judge, are transmitted and filed in the same manner as those signed and adopted by the judge.

Office copies of proceedings in Report Office exempt from new orders.—Office copies of proceedings filed in the Report Office are exempted from the Orders 25th October, 1852; (1st Order, 25th October, 1852, rule 1); and must therefore be obtained at the Report Office according to the old practice: (Ayck. 445, 5th edit.)

Certificate may be varied notwithstanding it has been signed and adopted by the judge.—The certificate or report, how-

ever, notwithstanding it shall have been signed and adopted by the judge and filed, may yet be varied either at chambers or in open court, according to the nature of the case, on application by summons or motion within such time as shall be prescribed by any General Order of the Lord Chancellor; and nothing therein contained shall prejudice or affect the power of the court at any time to open any such certificate or report upon the same or the like grounds as any reports of a master of the court which has been absolutely confirmed may be opened: (15 & 16 Vict. c. 80, s. 34.)

When and how application to vary certificate should be made.—The application for summons or motion to discharge or vary any certificate or report after it has been signed and adopted by the judge sitting in chambers, is to be made eight clear days after the filing of such certificate or report: (51st Order, 16th October, 1852.) And the time for making the application to discharge or vary any certificate of the chief clerk, which is to be acted upon by the Accountant-General without any further order, is two clear days after the filing thereof: (4th Order, 1st June, 1854.)

Any person dissatisfied with certificate is entitled to have his objections argued.—Any person who is dissatisfied with the certificate of the chief clerk is allowed the option of having his objections argued, either before a judge in chambers, or in open court; but a rehearing will not be allowed except under very special circumstances, where the objections have been argued before a judge in chambers.

Course of proceeding to be adopted on appealing against a certificate.—If the party wishes to appeal from such certificate his proper course is to make an application in open court, when the judge will make an order *pro formâ*, in conformity with the decision in chambers, against which the party can appeal: (*York Railway Company v. Hudson*, 2 Eq. Ca. Rep. 295; 22 L. T. Rep. 151.) If the court below refuses to grant the application, the party may then move by way of appeal to the Court of Appeal: (*Hatch v. Searles*, Ayck. 446, 5th edit.)

Sales under a decree not within the Statute of Frauds.—Sales under a decree or order of the Court of Chancery being a judicial act, do not come within the Statute of Frauds, and will, therefore, be enforced, notwithstanding the

purchaser, or any other person on his behalf, should omit to sign his name to the bidding paper attached to the conditions of sale: (*Attorney-General v. Day*, 1 Ves. 218.)

2. *As to the opening of the biddings.*

Practice of Courts of Equity in opening the biddings.]—Sales under a decree, as we have previously remarked (*ante*, p. 82), differ from sales under ordinary circumstances, in consequence of the power vested in the court, and which it often exercises, of opening the biddings after a purchaser has been declared the best bidder, and his name duly entered as such in the bidding paper annexed to the conditions. The object of the court in allowing the biddings to be opened is to obtain as high a price as can possibly be obtained for the property, and therefore, upon a considerable advance in price beyond what had been originally bidden for the property being offered, and a proportionate deposit paid in, the court has been in the habit of opening the biddings and directing a resale.

At whose application, and under what circumstances, the court will open the biddings.]—As a general rule any person may apply to open the biddings (*Ayck*. 439, 5th edit.), and the biddings may be opened more than once, and that even at the instigation of the same party where sufficient cause is shown, (*Scott v. Nisbett*, 2 Bro. C. C. 475; *Hodges v. Jones*, 2 Fowl. Pract. 318; *Upton v. Lord Ferrers*, 4 Ves. 700; *Rigby v. M'Namara*, 6 *ib.* 617; *Preston v. Barber*, 16 *ib.* 140); and instances have occurred where the biddings have been opened, even after the confirmation of the Master's report; as, when a large increase of price has been offered, coupled with the circumstance that the party for whose benefit the sale was made, was in prison: (*Bowyer v. Barkwell*, 3 Anstr. 656; *White v. Wilson*, 14 Ves. 153; *Executors of Fergus v. Gore*, 1 Sch. & Lef. 350.) But, generally speaking, the court has refused to open the biddings after the confirmation of the report (*Morrice v. Bishop of Durham*, 11 Ves. 57; *Chatham v. Grudgeon*, 5 Ves. 86), unless in cases where it has been shown that some gross fraud has been practised; as, where parties have agreed not to bid against each other, or a fraudulent survey has been made of the premises, with the connivance or knowledge of the purchasers, by which the estate is misrepresented in point of extent or value, and the vendor is ignorant of the deception which has been

practised, in either of which cases even an absolute confirmation of the report did not prevent the biddings from being again opened: (*Prideaux v. Prideaux*, 1 Bro. C. C. 287; *Watson v. Birch*, 2 Ves. 51; *Gower v. Gower*, 6 Bro. C. C. 306; S. C., 2 Eden, 348.)

Usual ground of application for opening biddings.—The usual ground upon which an application to open the biddings is founded is a further advance in price, though it is not clearly settled what amount of increase the court will require. Formerly, an opinion was entertained that ten per cent. on the original purchase money, where the sum was large, would be received (*Anon.* 3 Mad. 494), but no such rule now prevails: (*Bridges v. Phillips*, referred to 2 Mad. Pract. 2nd edit. 502; *Andrews v. Emerson*, 7 Ves. 4; *White v. Wilson*, 14 ib. 151.) In many instances a less advance has been holden sufficient, and the biddings have been opened even on so low an advance as five per cent., where the purchase money has amounted to a considerable sum; as, for instance, 500*l.* and 10,000*l.* (*Brooks v. Smith*, 3 Ves. & Bea. 144); whilst in other cases, where the amount of price was small, advances at a far greater proportion to the original sum have been refused. In *Garston v. Edwards* (1 Sim. & Stu. 20), an advance of 300*l.* on 3,500*l.* was refused; whilst in *Lawrence v. Halliday* (6 Sim. & Stu. 296), the same offer of advance on a larger amount, viz., 300*l.* on 5,030*l.* was accepted, as was also the sum of 365*l.* on 7300*l.* in the still more recent case of *Domville v. Barrington* (2 You. & Coll. 723.) Upon the whole, therefore, it seems that the court is not so much guided by per centage as by the actual amount offered; and consequently, where an important sum, as 500*l.*, or 5*l.* per cent on 10,000*l.* is offered, it would probably be accepted, at the same time that an offer to advance 50*l.*, or the same rate of per centage on 500*l.* would be refused; and it seems that, under any circumstances, where the advance offered is inconsiderable, as under 40*l.* for instance, it will be disregarded: (*Farlow v. Wielden*, 4 Mad. 460; *Brookfield v. Bradley*, 1 Sim. & Stu. 23; *Leland v. Griffiths*, 2 Moll. 510.)

Court will not open the biddings upon the sale of a colliery, unless security be given.—Where a colliery is the subject of the sale, the court will not, it seems, open the biddings unless security be given to answer the difference between the produce of the resale and the original sale: (*Williams v. Attenborough*, T. & R. 70.)

How application for opening biddings must be conducted.—The application to open the biddings was formerly made by motion, of which due notice must have been given to the purchaser, and also to the parties in the cause (2 Turn. Pract. 649, 650), but the practice now is to obtain an order on application either by motion, or at chambers, and notice must be served on the purchaser's solicitor; and where several lots are purchased by distinct purchasers, a separate motion must be made in respect of each lot: (*Goodall v. Pickford*, 6 Sim. 379.) The order, if granted, is drawn up in the usual way, after which the applicant must pay in his deposit (*Anon.* 3 Mad. Rep. 494; *Anon.* 6 Ves. 513); as also the costs incurred by the first purchaser, the latter of whom will be thereupon discharged from his purchase and entitled to have any deposit he may have paid returned to him: (*Daniel*, 1211, 2nd edit.)

Resale, how conducted.—The biddings being opened a resale will be thereupon directed, the proceedings of which are conducted in precisely the same manner as an original sale: (*Ayck.* 441, 5th edit.) If the party who opens the biddings is outbid at the resale, he will be entitled to receive back the deposit he paid in upon making his application for a resale (*Rigby v. M'Namara*, 6 Ves. 466; *Macclesfield v. Blake*, 8 ib. 214; *Trefuss v. Clinton*, 1 Ves. & Bea. 361; *Williams v. Attenborough*, T. & R. 77), but he will not be entitled to any allowance for any other incidental expenses he may have incurred, as those are considered in the nature of a premium given for the opportunity of bidding. Still, the latter rule has some exceptions; for instances have occurred, in which a party opening the biddings has been allowed his out-of-pocket expenses, where he has come forward in a disinterested manner for the benefit of the family, when by some mistake the property has been knocked down at a sum greatly below its actual value, in order to protect the interest of third persons, and not merely with a view of aiding any private speculation of his own: (*Owen v. Foulkes*, 9 Ves. 348; *West v. Vincent*, 12 id. 6.)

3. Sales by private contract.

New orders relating to sales by private contract.—When any property is directed to be sold before the Master, he is at liberty, either before or after such property shall have been offered for sale by public auction, to receive proposals for the sale thereof by private contract, and he shall make

his report thereof, with his private opinion thereon, to the court, which report shall be submitted to the court for confirmation in the same manner as reports made upon special reference as to sales by private contract: (4th Order, 16th July, 1851; Ayck. 398, 5th edit.)

Course to be pursued where a party is desirous of purchasing by private contract.]—Where, therefore, any one is desirous of purchasing by private contract, his proper course is to make a proposal to the vendor, or to the plaintiff in the cause, whereupon a contract is entered into and signed by the parties, and is carried into the judge's chambers. It must be supported by the affidavit of a surveyor or some other competent person, alleging that the contract is fair, and that it will be for the benefit of the estate that it should be carried into effect. If the contract is approved, the chief clerk prepares his certificate thereof, and the subsequent proceedings conducted in the same manner as where the contract is entered into upon a sale by auction: (Ayck. 442, 5th edit.)

III. OF THE REQUISITES TO CONSTITUTE A VALID CONTRACT.

1. Of the operation of the Statute of Frauds upon contracts relating to the sale of real property.
2. As to informal instruments.
3. What will amount to a valid signature.

1. *Of the operation of the Statute of Frauds upon contracts relating to the sale of real property.*

Agreements for the sale of real estate must be in writing.]

—All agreements for the sale of real estate are required by the Statute of Frauds to be in writing, signed by the party, or some other person by him thereunto lawfully authorized: (29 Car. 2, c. 3, s. 4.)

What interests in lands are within the Statute of Frauds.]

—An agreement which confers the vesture of land for a limited time and for a given purpose is an interest in land within the statute; as, for example, the sale of a crop of mowing grass (*Crosby v. Wadsworth*, 6 East, 602), or of the next year's growth of hops (*Bristow v. Waddington*, 2 Bos. & Pull. 452); as also of timber, coppice, and the produce of fruit trees, as apples or the like, and also of such fixtures as may not be removed by the tenant, and which descend with the land to

the heir (*Scorrell v. Bozall*, 1 You. & Jerv. 396.) But such things as are *fructus industrialis*, as potatoes, or turnips in the ground (*Dunne v. Ferguson*, 1 Hayes, 541), growing crops of corn (*Mayfield v. Wadsley*, 3 B. & C. 357), or fixtures of that kind which may be removed by the tenant (*Hallen v. Rander*, 1 Cr. M. & R. 266), do not fall within the operation of the 4th section of the statute (*Janisbury v. Mathews*, 4 Mees. & Wels. 343; *Jones v. Flint*, 2 Per. & Dav. 594), although they all of them fall clearly within the range of the 17th section, which requires either an acceptance, or some part of the goods, or something given in earnest to bind the bargain, or some note or memorandum in writing, signed by the party or his lawfully authorized agent, in all cases where the price is above 10*l.*; and such sales will consequently be invalid unless the terms prescribed by the last-mentioned section of the statute are duly complied with: (*Howe v. Palmer*, recognised in *Hanson v. Armitage*, 5 B. & Ald. 577.)

Sale of railway shares not within the statute.—Railway shares are not an interest within the 4th section of the Statute of Frauds (*Bradley v. Holdsworth*, 3 Mees. & Wels. 144); but the law is otherwise with respect to the shares in a mining company, which are clearly within that section of the statute (*Boyce v. Green*, Batt. 608), as is also the right of drawing water from a well: (*Tyler v. Bennett*, 6 Nev. & Man. 826.)

An unwritten agreement may be supported if actually executed.—But notwithstanding a party is precluded from bringing any action in the case of a parol agreement concerning an interest in lands within the 4th section of the Statute of Frauds, still this does not wholly vacate the contract, which, if executed, will be supported both at law (*Poulter v. Killenback*, 1 Bos. & Pull. 397) and in equity: (*Morphett v. Jones*, 1 Swanst. 172.)

Part performance will take case out of the statute in equity.—Courts of Equity, indeed, do not require that the contract shall be actually completed in order to take a case out of the statute, considering a part performance sufficient for that purpose; for then the evidence of the bargain does not rest merely upon words, but upon acts actually done: (*Foxcraft v. Lister*, cited 2 Vern. 456; *Gunter v. Halsey*, Ambl. 586.)

What acts will amount to part performance.—As to what acts a court of equity will consider sufficient to constitute a

part performance, it appears that where a purchaser, on a verbal agreement, is let into possession of the property by the vendor (*as to which see the cases above referred to*), it will be held to be such a part performance of the agreement as will take the case out of the statute, and be binding both on vendor and purchaser: (*Gregory v. Mighell*, 18 Ves. 382; *Morphett v. Jones*, *supra*.) But a simple act of entry without the permission of the vendor will amount to nothing; neither will a continuance in possession by a tenant after the expiration of his tenancy (*Cole v. Brown*, 1 Bro. C. C. 409), unless the landlord were to accept additional rent, or rent payable in a different manner than the reserved rents in the lease, in which case, it seems, the landlord would be bound to answer whether such rent was accepted as a holding from year to year, or upon what other terms: (*Wills v. Stradling*, 3 Ves. 373; *Frame v. Dawson*, 14 *ib.* 386.)

Of the requisites to support an agreement by part performance.—To support an agreement by part performance, it will be necessary to show the terms of the agreement itself, and the acts done to constitute it a part performance must be such as could be done with no other design. Hence the entering into preliminary matters, such as the delivery of abstracts, or a draft of the conveyance, or employing surveyors to look over the estate and value the property, will be insufficient; such acts being considered as merely introductory or ancillary to an agreement, and not as a part performance of it: (*Thomas v. Blackman*, 1 Coll. 301.)

Whether payment of money will constitute a part performance.—Whether the payment of money will constitute a part performance is a question on which the cases are very contradictory, and the doctrine that has been sometimes laid down that the payment of a substantial part of the price will take the case out of the statute, though a trifling payment will not, seems rather to raise a question than establish a rule, from the extreme difficulty of deciding what is to be the limit at which such payment ceases to be trifling and really becomes substantial; and Lord Redesdale, in *Oligan v. Cooke* (1 Sch. & Lef. 40), seems to have held that the payment of money, however considerable, was insufficient to take an agreement for the sale of lands out of the operation of the statute. "The great reason," his Lordship said, "why payment does not take an agreement affecting lands out of the statute is, that the statute has said, viz., 'with respect to goods, it shall operate as a part performance;' from whence

it may reasonably be inferred, that when the Legislature said it should bind in the case of goods, and were silent as to the case of lands, they meant it should not bind in the latter instance;" so that, after a great fluctuation of opinion, it seems at length to be finally determined, that payment of money will in no instance be deemed such an act of part performance as will take the case out of the statute: (*O'Herlihy v. Hedges*, 1 Sch. & Lef. 123; *West v. Evans*, 4 You. & Coll. 759.)

Operation of statute where property is sold in lots.—Where property has been sold in lots to a purchaser, a performance as to one of the lots will only take the agreement out of the statute as far as that particular lot is concerned, but will in nowise affect the rest of the lots: (*Buckmaster v. Harrop*, 7 Ves. 341.)

Sales by auction, and under proceedings in bankruptcy, are within the statute.—Sales by auction (*Blagden v. Bradbear*, 12 Ves. 466), and proceedings in bankruptcy, are within the Statute of Frauds (*Ex parte Cutts*, 3 Dea. 267); but not sales under a decree or order of a court of equity: (see *ante*, p. 87.)

Acts amounting to part performance binding on representative.—Where the acts of part performance are such as to be binding on the party concurring in them, they will be equally so upon his representatives: (*Attorney-General v. Day*, 1 Ves. sen. 221.)

Equity will not decree a specific performance unless the terms of the agreement can be shown.—Before a court of equity will decree a specific execution of the contract upon the grounds of its part performance, it must be clearly shown what the terms of such contract actually were, otherwise it will be impossible to carry them into effect: (*Mortimer v. Orchard*, 2 Ves. 243.) The mere act of expenditure of money, however great, can afford no evidence of the duration of interest contemplated by the parties (*Wheeler v. D'Esterre*, 2 Dow. 360); neither can the fact of a party having been let into possession afford any proof either of the price agreed upon, or of the quantity of interest intended to pass, where the agreement itself is altogether silent upon those matters: (*Attorney-General v. Day*, *supra*; *Wills v. Stradling*, 3 Ves. 382.) Still, if the terms of the agreement are made out

satisfactorily to the court, contrariety of evidence will not be very material: (*Attorney-General v. Day, supra.*)

Confession of agreement will take the case out of the statute.—The confession of the agreement by a defendant in his answer has been considered by courts of equity as not falling within the mischiefs it was the object of the statute to prevent, and consequently, where there was a confession of this kind, a specific performance of it has been decreed accordingly: (*Spurrier v. Fitzgerald, 6 Ves. 548.*)

But not where defendant sets up the statute as a bar to relief.—But notwithstanding a number of conflicting opinions, it seems at length to be decided, that a defendant may, if he thinks proper, use the statute as a bar to relief, although he admits the agreement: (*Row v. Teed, 15 Ves. 375.*) But if the defendant admits the agreement, and fails to insist upon the statute, he will be taken to have renounced his intention to avail himself of its protection (2 Cha. Cas. 136, 143, 164); and in such case, it seems, he will not be allowed to set up the statute in his answer to an amended bill; and therefore if he confesses the agreement, without resorting to the statute, a specific performance will be decreed against him, whether he submits to perform the agreement or not: (*Skinner v. M'Donnell, 11 L. T. Rep. 411.*)

2. As to informal instruments.

What will constitute a valid contract within the Statute of Frauds.—As agreements for the sale of landed property are often entered into by the parties themselves, without any professional advice or assistance whatever, it necessarily follows that instruments so prepared are frequently drawn up in an informal manner, and sometimes so inaccurately penned, as to be altogether inoperative. It is of the utmost importance, therefore, that a solicitor, when his aid really is called for, should be able to decide to what extent such instruments are effectual, and whether or not they may be relied upon as constituting a valid contract. To come to this important decision he must always bear in mind that there are five requisites to constitute a valid contract within the 4th section of the Statute of Frauds, viz., 1. The contract must be in writing; 2. It must contain the names of both vendor and purchaser: (*Tumley v. Hartley, 11 L. T. Rep. 102.*) 3. A description of the property: (*Seagood v. Meale, 1 Eq. Ca. Abr. 49, pl. 20; S. C., 1 Str. 246.*) 4. The price to be

paid for the purchase (*Elmore v. Kingscote*, 5 B. & C. 583); and, 5. It must be signed by the party to be bound by it, or his lawfully authorized agent. Unless it possesses every one of these five requisites, the contract cannot be supported.

What is a sufficient note or writing.—But although the statute requires the contract to be in writing, it does not specify any particular form, so that even a receipt for the purchase money has been held to constitute a valid contract within the statute (*Coles v. Tregothic*, 9 Ves. 234); neither is it necessary that the note in writing should be contemporaneous with the agreement, for if adopted by the party at any time afterwards, it will be equally effective; and parol evidence is admissible to point out the different writing referred to (*Hind v. Whitehouse*, 7 Ves. 558; *Kenworthy v. Schofield*, 1 B. & C. 945), hence an indorsement by the defendant on the draft of a lease of the premises in question, which had been perused and altered by his own attorney in the following terms:—"I hereby request Mr. Shippey to endeavour to let the premises to some other person, as it will be inconvenient for me to perform my agreement for them, and for so doing this shall be sufficient authority. J. Derrison," was determined to be a valid contract; notwithstanding it was admitted at the time when the agreement for a lease was entered into, it was not introduced into writing, nor was any memorandum made of it: (*Shippey v. Derrison*, 5 Esp. N. P. C. 190.) And if an agreement contains all the requisite terms, and is properly signed, it will not be annulled by being sent in the form of instructions to a solicitor, in order that an agreement may be drawn up from it in a more regular and technical form: (*Smith v. Weston*, Bunb. 55; *Welford v. Beazley*, 3 Atk. 503.) But merely altering a draft, although the name of the party be inserted in the body of it, will not be sufficient to take the case out of the statute: (*Ithell v. Potter*, 1 P. Wms. 771, cited; *Hawkins v. Holmes*, *ib.* 770.) Neither will the name of the party inserted in the body of the instrument, and applicable to particular purposes, amount to such an authentication as the statute requires: (*Stokes v. Moor*, 1 Cox, 219.)

When a contract may be established through the medium of a correspondence by letters.—Where questions of this nature most frequently arise is when a contract is sought to be established through the medium of a correspondence carried

on by a series of letters, which, if they contain either in themselves, or by reference to any other writing, the terms of the agreement, they will be valid as such, notwithstanding the writer may have looked to the execution of a more formal instrument: (*Hindle v. Whitehouse*, 7 East, 558; *Feoffees of Herriot's Hospital v. Gibson*, 2 Dow. 301; *Powell v. Dillon*, 2 Ball & B. 416; *Fowle v. Freeman*, 9 Ves. 351.) Still, it is essential that the latter should contain the terms of the contract, and import a concluded agreement; for should it appear from the tenor of the letters that what passed was a simple treaty, a specific performance would never be decreed, however far such treaty may have gone (*Huddleston v. Briscoe*, 11 Ves. 591; *Holland v. Eyre*, 2 Sim. & Stu. 194; *Routledge v. Grant*, 4 Bing. 653), and still less so, where the letters, instead of being a ratification, are written for the purpose of abandoning the contract: (*Gosbell v. Archer*, 2 Ad. & Ell. 500.)

3. *What will amount to a valid signature.*

Name, if inserted so as to give authenticity to the instrument, may be inserted in any part of it.—With respect to what will amount to a sufficient signature, it appears that where the name of the party to be bound by it is inserted in such a manner as to have the effect of giving authenticity to the whole instrument, it does not materially signify in what part of such instrument it is found (*Stokes v. Moor*, 1 Cox, 219); and hence it has been held, that if a person were to write an agreement and begin thus, "A. B. agrees to sell," it is a sufficient signing within the statute, and this, notwithstanding a space may be left for the signature at the bottom of the paper: (*Hawkins v. Holmes*, 1 P. Wms. 770; *Saunderson v. Jackson*, 2 Bos. & Pull. 238; *Knight v. Crockford*, 1 Esp. N. P. C. 190; *Allen v. Bennett*, 3 Taunt. 169.) But the signature of the name in some way or other is absolutely necessary. Hence, a letter from a mother to her son, addressing him by his christian name, as "My dear Nicholas," and concluding with "your affectionate mother," with the full name and address of the party set forth in the direction, was considered to be an insufficient signing within the statute: (*Selby v. Selby*, 3 Mer. 2.) But if the name of the party to whom a letter is addressed appears in an indorsed direction, or be written at the foot of the letter, it will be sufficient; and if an envelope be used, the court, it seems, would receive the envelope with the enclosure.

Signing by a stamped or printed name sufficient.—Where a party is in the habit of stamping, instead of signing his name, it will be considered a sufficient signature within the statute (*Champion v. Plummer*, 1 Bos. & Pull. N. C. 252; *Schnieder v. Norris*, 2 M. & S. 286); as will also a mark made by an illiterate person, or by one who, on account of bodily weakness, or other infirmity is incapable of signing his name; and it seems also that where a printed signature is done by a party's directions, it will be a signing by a lawfully authorized agent within the meaning of the statute (*Id. ib*); but stamping an instrument with a seal is not such a signature as the statute requires: (*Smith v. Evans*, 1 Wills. 313; *Grayson v. Atkinson*, 2 Ves. 454.)

When signing as a witness will be a sufficient signature.—If a party is aware of the nature of the instrument, it will be binding on him, although his signature is attached to it merely as a witness; but it will be otherwise if he were unaware of its contents; nor will the circumstance of his having so signed afford any evidence of his knowledge of the nature of the instrument, it being so frequent a practice for persons to sign their names as witnesses to agreements and other writings, without the slightest knowledge of their purport or contents: (*Welford v. Beazley*, 3 Atk. 503; *Harding v. Crethom*, 1 Esp. N. P. C. 58.)

As to agreements entered into by agents.—An agreement, as we have already noticed, may be entered into by the lawfully authorized agent of the party to be charged, as well as by the party himself; and such agent, for any of the purposes required under the section of the statute we have been treating upon (*Rucker v. Cammeyer*, 1 Esp. N. P. C. 106; see also *Emerson v. Heelis*, 2 Taunt. 46; *Maclean v. Dunn*, 4 Bing. 722; *Gosbell v. Archer*, 2 Ad. & Ell. 500), need not be appointed by writing, although this is expressly required by the first and third sections of the act which relates to leases and other uncertain interest in lands. But although the agent's signature is binding on his principal, a signature by his clerk will not have this operation; still, the principal may, if he thinks proper, confer such a special authority upon him, or it may be implied from his subsequently acquiescing in his acts: (*Maclean v. Dunn*, 4 Bing. 722; *Coles v. Tregothie*, 9 Ves. 234.)

Contract binding on the party signing, although unsigned by the other party.—A contract is binding on the party signing

although it be not signed by the other party. This important point was decided very shortly after the passing of the Statute of Frauds, and the law has remained unaltered in this respect down to the present time: (*Hatton v. Gray*, 2 Cha. Cas. 164; *Cotton v. Lee*, 2 Bro. C. C. 564, cited; *Backhouse v. Crosbie*, 2 Eq. Ca. Abr. 32, pl. 44; *Robson v. Collins*, 7 Ves. 130; *Seton v. Slade*, *ib.* 265, *Fowle v. Freeman*, 9 *ib.* 351; *Egerton v. Mathews*, 6 East, 307; *Ex parte Minet*, 14 Ves. 286; *Ex parte Gardon*, 15 *ib.* 286; *Bateman v. Phillips*, 15 East, 272; *Wain v. Warlters*, 5 East, 10; *Huddleston v. Briscoe*, 11 Ves. 583; *Western v. Russell*, 3 Ves. & Beav. 187; *Saunders v. Wakefeld*, 4 B. & A. 595; *Jenkins v. Reynolds*, 3 Bro. & Bing. 14; *Laythoarp v. Bryant*, 2 Bing. N. C. 735.) But if one only of the parties be bound, he may require the other party to signify in writing his assent or dissent to the contract, and unless this be acceded to, he will be at liberty to rescind it: (*Laythoarp v. Bryant*, 2 Bing. N. C. 735; *Fowle v. Freeman*, 9 Ves. 354; *Owen v. Thomas*, 3 Myl. & Kee. 753.)

CHAPTER III.

RELATING TO THE ABSTRACT, AND INVESTIGATION OF
THE TITLE.

- I. DIRECTIONS FOR PREPARING THE ABSTRACT.
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 3. When a double abstract will be necessary.
 4. How the various documents should be set out.
 5. Deeds, how to be abstracted.
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 7. Acts of Parliament, fines and recoveries, and matters of fact concerning the title.
 8. Statement at the foot of the abstract.
- II. DELIVERY OF THE ABSTRACT.
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1. *By whom and how the Abstract is to be prepared.*

Preparing abstract is a duty which devolves upon vendor's solicitor.]—In former times counsel were often employed to prepare abstracts, but it is now become one of the duties which devolves solely upon the solicitor. The rule of practice is for the vendor's solicitor to prepare the abstract, and for the vendor to supply it to the purchaser at his own expense (see *ante*, p. 39), but where sales are made to public companies established under acts of Parliament (*Re London and Greenwich Railway Company*, 3 Hare, 322), or under the provisions of the Lands Clauses Consolidation Act (7 & 8 Vict. c. 118, s. 82) the costs of the abstract, in the absence of some agreement to the contrary, are usually thrown upon the companies. In all other cases, it seems, a purchaser, as a matter of right, can insist upon the vendor's furnishing him with an abstract at his own expense, even although the purchaser may have agreed to accept the title (*Morris v. Kearsley*, 2 You. & Coll. 139); and where one tenant in common purchases of another, he will be equally entitled to an abstract of the general title in the same manner as any ordinary purchaser. (*Ib.*)

How abstract is prepared.]—The practice is to make a rough draft of the abstract on common draft paper, which may be written either on one, or on both sides, and should be made with margins in the same order of arrangement as the various parts of the documents are to appear in the completed abstract, about which directions will be duly given hereafter.

Importance of having a perfect abstract in the first instance.]

—The preparation of an abstract requires both skill and care, it being important that it should be made perfect and complete in the first instance; for if this be not done, and it afterwards requires to be perfected, a delay in the progress of the sale must not only be incurred, but a question may also arise, if the contract or conditions stipulate that the vendor shall deliver an abstract within a certain time, and that the purchaser shall make his objections within a certain time, whether the second stipulation is not conditional on the performance of the first, and consequently, the first not having been performed, the purchaser is absolved from the second, and thus discharged from all obligation of making his objections within the time specified: (*Hobson v. Bell*, 2 Beav. 17; *Southby v. Hutt*, 2 Myl. & Cra. 211); and thus a vendor's interests may be prejudiced by his solicitor's negligence, who with ordinary care and foresight might have prevented the possibility of such an occurrence.

As to the fair copying of abstract.]—When the whole of the documents have been abstracted, the solicitor should look carefully through the draft, to see that all the matters are correctly set forth, and then the draft should be fairly copied off on brief paper. Ordinary abbreviations may be used. The abstract should be written in a clear and legible hand, for if written illegibly, or upon paper of such an inconvenient size as to render its perusal difficult or inconvenient, it will, it seems, afford a purchaser's solicitor sufficient ground for refusing to receive it: (*Dart's Vendors*, 146, 1st edit. referring to Sug. 431.)

Costs for preparing abstract.]—The usual charges of a solicitor for preparing an abstract are, 13s. 4d. for taking the instructions; 6s. 8d. per sheet of eight common law folios, for drawing the abstract; and 3s. 4d. per sheet for fair copying.

2. *Of the root or origin of the title.*

How abstract should be headed.]—The abstract commences with a heading, setting out the name of the owner, the nature and tenure of the property, as freehold, copyhold, leasehold, &c., and the estate and interest he takes in it; it usually runs to the following effect, viz. :—

“Abstract of the title of *A. B.*, Esq., to the fee simple and inheritance of all that capital farm called Barton

Dale, in the parish of *A.*, in the county of *B.* containing (*number of acres*) statute measure.

or,

"of the manor of *A.* in the county of *B.*

or,

"of all that messuage or dwelling house, with the curtilage thereunto adjoining."

If the property is leasehold, holden either for a term of years, or lives, or years determinable on lives, a slight alteration in the form will be required, as for example—

"An abstract of the title of Mr. *A. B.* to a leasehold tenement called Newlands, situate in the parish of *A.*, in the county of *B.*, held for the residue of a term of ninety-nine years.

or,

"for three lives.

or,

"for the residue of a term of ninety-nine years, determinable on three lives."

Sometimes the vendor is described in the character under which he sells, as trustee, or mortgagee, or under a trust or power of sale. The parcels also, where the description of them is short, are sometimes set out in this part of the abstract, and merely referred to afterwards.

As to advowsons..]—In an abstract of title to an advowson, a statement of the presentations, with the name of the patron and clerks, according to the form given by Mr. Preston in his valuable work upon Abstracts, should be set out at the heading of this abstract, viz. :—

"A statement of the presentations, with the names of the patrons, and of the clerks, presented during the period of this abstract: (1 Prest. Abr. 38.)

"*A. B.*, presented by *C. D.*, March 12, 1740.

"*T. D.*, clerk, presented by the *W. C.* 4th March, 1796."

And so continue the whole list of presentations down to the presentation of the present incumbent.

Of the root or origin of the title..]—In preparing an abstract it is important that the origin or root of the title should be taken up with the proper instrument, and commence at the proper time. This, as far as time is concerned,

should be carried back to a period of not less than sixty years; for notwithstanding the arguments urged by some of our modern writers, that the recent Statute of Limitations (3 & 4 Will. 4, c. 27), has so shortened this period, as to render it a convenient rule to take a middle course, and to treat forty or fifty years as a sufficient time to trace back a title in ordinary cases (see Sugd. Vend. & Purch. 132, 10th edit.), there does not appear to be anything in the statute to warrant the introduction of any rule of this kind; for though it renders the security of sixty years better than it was before, because the time within which suits may be instituted is thereby shortened, still, another ground of the rule, viz., the duration of human life is not affected by it; and the objection to titles on the ground that the conveying parties might have been mere tenants for life, or that there might be subsisting equitable rights as between trustees and *cestuis que trust* still exists; although titles are sometimes strengthened in the last-mentioned instance, as the statute will now begin to run from the time a conveyance is made to a purchaser: (3 & 4 Will. 4, c. 27, s. 25.) Whatever, therefore, was the intention of the Legislature in passing this Statute of Limitations, it has not led to the result of shortening the period from which titles are to be deduced: (*Cooper v. Emery*, 1 Phill. 388; *Hodgkinson v. Cooper*, 6 L. T. Rep. 451.)

When a sixty years' title will be insufficient.]—Neither will it be sufficient in all cases to carry back the title to some document of sixty years since or upwards, for the operation of such document may depend upon the validity of some previous instrument, from which it derives its whole force and operation; as where the document operates as the execution of a power limited by some previous deed or will, in which case the instrument creating the power must be abstracted; and the like doctrine holds with respect to a settlement made in pursuance of marriage articles, where the articles themselves must necessarily be abstracted, in order to satisfy a purchaser that the settlement was made in strict accordance with them: (1 Prest. Abs. 1, 70.) And in cases where the first-abstracted document contains any recitals which raise the slightest doubt, or any question arises respecting the construction, effect, or operation of any of the earlier documents, the purchaser has a right to have so much of the prior title abstracted as will be sufficient to remove such doubt, and settle such question. In the case of copyholds, the admit-

tance should be preceded by the surrender ; and a recovery deed, by the deed creating the entail : (1 Jarm. Con., Sweet's edit. 67.) But, it seems, if a recovery has been suffered more than sixty years ago, it will be no objection to the title that the deed or will by which the entail was created cannot be produced. If in existence, it ought to be abstracted and produced ; but if lost, evidence of the possession having gone along with the estates created by the recovery for a considerable length of time, will be sufficient to raise the presumption that the recovery has been duly suffered : (1 Prest. Abs. 16.) And the same principle would probably apply where the instrument creating the power is incapable of being produced : (see *Nouaille v. Greenwood*, Turn. & R. 26.)

With what kind of documents the title should commence.]

—As a general rule, it will be sufficient to commence the root or origin of the title with some purchase deed, settlement, or will, at any date at or beyond sixty years, without incumbering the title with any of the previous documents, which a purchaser is neither entitled to require, nor a vendor's solicitor justified in putting his client to the costs of abstracting. But although a purchaser has no right to call for an abstract of any documents prior to the date that would constitute a good root to the title, he may nevertheless require the production of every document relating to the title, however ancient such document may be.

Proper document to form the root of the title.]—Mr. Preston suggests that the best instrument to form the root of the title is the deed of conveyance to the first purchaser, as affording the strongest presumption that the title was considered good at that time, and that the person who made it was the absolute owner in fee simple ; but that when a title cannot be taken up by an instrument of this kind, the next best instrument for the purpose is a will, or some settlement made by the person acting as the absolute owner of the fee simple ; for either of these two last-mentioned documents, with possession consistent with the evidence of title, furnish the like presumption of a good title ; and this presumption is greatly strengthened, if there has been a frequent change of ownership without any adverse claim. But a lease is not a good instrument to be made the root of a title to an estate in fee simple, where the vendor has the means of showing any of the earlier documents of title. And where a lease is

relied on, it will not be sufficient to prove that it was a valid instrument, but it must also be shown that the lessee had the actual possession of the estate under it: (*Clarkson v. Woodhouse*, 5 T. R. 412.)

Where documents of title are lost vendor must prove their contents.—In case any of the early documents of title are lost, or destroyed, the vendor must be able to prove their contents and execution (*Bryant v. Bush*, 4 Russ. 1); but where there are no documents of title, it will then be sufficient to produce evidence of such long uninterrupted possession, enjoyment, and dealing with the property, as to afford a reasonable presumption that there is an absolute title in fee simple: (*Prosser v. Watts*, 6 Mad. 59; *Cottrell v. Watkins*, 1 Beav. 365.)

Pedigree should accompany abstract, when.—As often as a title depends upon a descent, a pedigree, authenticated by such evidence as would be sufficient to support the title in case of an adverse claim, should accompany the abstract: (1 Prest. Abs. 244.)

Advowsons.—In the case of an advowson, it has always been considered necessary to trace back the title farther than with respect to any other kind of real property. The reason of this was, that the advowson might not have been in possession, nor an opportunity occurred of trying the title to it for more than sixty years. But since the passing of the recent Statute of Limitations, 3 & 4 Will. 4, c. 27, which enacts that no advowson shall be recovered but within three incumbencies adverse to the right of presentation, or sixty years (sect. 30), and in no case after an adverse possession of one hundred years (sect. 32); the practice now is to carry back the title to one hundred years, and to have a list of presentations, in the form before alluded to, annexed to the abstract, for the purpose of showing that acts of ownership have been exercised in conformity with such right of presentation, which list of presentations, as we have previously noticed, should be shown at the head of the abstract.

Tithes.—With respect to tithes, notwithstanding the original right to them is founded on a grant from the Crown at the dissolution of the monasteries, no one now ever thinks of calling for a title commencing and regularly deduced from

so ancient a time. A clear sixty years' title, therefore, is all that a purchaser of this kind of property is now entitled to require. The proper way to commence a title to property of this kind is to set out the original grant from the Crown, and then, omitting all the intermediate instruments, take up the title again with some sufficient document upwards of sixty years back. It will be necessary, also, to commence the title to the tithes, and deduce it in like manner where the tithes have been merged under the recent Tithe Commutation Acts, and the property is intended to be sold tithe free.

Reversionary interests.]—Upon the sale of a reversionary interest, it will be necessary in every case to carry the title back to its creation, however distant that date may be; and it must also be shown that the possession has been enjoyed conformably with the instrument creating the reversion.

Ancient terms of years.]—In the case of an old term of years, as in the instance of tithes we have already alluded to, it will be sufficient to abstract the original deed creating the term, and a sixty years' title to the possession, omitting the intermediate assignments. And where there has been a sixty years' possession, it seems that the loss of the deed creating the term itself will not invalidate the title: (1 Prest. Abs. 25, 249.)

As to lessor's title in sales of leaseholds.]—In leaseholds, as we have already seen, a vendor cannot, in the absence of an express stipulation to the contrary, enforce a specific performance of a contract without showing his lessor's title; in the absence, therefore, of a stipulation to the above effect, the vendor's title must be abstracted, and traced back to the same period as in the case of the sale of the actual freehold, and it must appear that the freehold has, since the demise, been enjoyed conformably with the earlier title.

As to enfranchised copyholds.]—So, where copyholds have been enfranchised, the title of the lord must in like manner be shown and carried back to the same period, and regularly deduced down to the time of enfranchisement; and it has even been said that a purchaser is entitled to require evidence of the manor having, since the enfranchisement, been enjoyed conformably with the title shown by the abstract: (1 Jarm. Con., Sweet's edit. 83.)

Bishop's lease an exception to the rule of purchaser's right to require lessor's title.—The rule with respect to showing the lessor's title in the case of a sale of leaseholds, it must be observed, does not extend to the case of a bishop's lease (*Fane v. Spencer*, 2 Mer. 430); but this seems to be the only exception, for the rule is equally applicable to leases granted by other corporations as when granted by a private individual: (*Id. ib.*)

As to renewed leases.—Where the subject-matter of sale is a renewed lease, which has been granted in consideration of the surrender of the former lease, such former lease should be abstracted, in order to show that the parties making such surrender and accepting such new lease had not only the legal title, but also an equitable right to perform those acts: (*Coppin v. Feryhough*, 2 Bro. C. C. 291; *Hodgkinson v. Cooper*, 9 Beav. 304.) And where the original lease was granted sixty years back or upwards, the title should be carried back at least to that period; and when granted within sixty years, should be traced up to the time at which such grant was made: (see *Cooper v. Emery*, 1 Phill. 388; *Hodgkinson v. Cooper*, *supra*.)

Mining shares.—Upon a sale of mining shares, the purchaser has no right to call for the production of the title to the mines themselves; all he is entitled to require is the production of such evidence of the constitution of the mining company, and of the nature of the title under which the mines are worked, as will show that the subject-matter of the purchase is what it professes to be, and that the proposed form of transfer will give him a valid title to the shares: (*Curling v. Flight*, 2 Phill. 613.)

As to mines.—But it is otherwise where the sale is not merely of the mining shares, but of the mines themselves; for in the latter case, a purchaser will be entitled to call for the grantor's title in order to show that he had the power to make such grant; still, where there has been a long and uninterrupted possession, accompanied by incontrovertible acts of ownership, a title may be made out without showing how such right originally accrued: (*Barnes v. Mawson*, 1 Mau. & Selw. 841.) Still the evidence must be very clear and satisfactory as to the acts of ownership, as in all cases an adverse claim to the minerals must be clearly established. Such a possession must, under the recent Statute of Limita-

tions (3 & 4 Will. 4, c. 27), have endured for the space of twenty years (sect. 2), and in case of successive disabilities for forty years from the time when the right of action accrued (sect. 17); so that it seems a purchaser of property of this description is entitled to a clear sixty years' title, in the same manner as in other ordinary purchases of real property.

3. *When a double abstract will be necessary.*

As to leasehold estates and enfranchised copyholds.—In the cases we have previously enumerated of the sale of leaseholds, of enfranchised copyholds, and in grants of mines, where they form a distinct property from the freehold, a double abstract will be necessary; one to show the title of the lessor, lord, or grantor, and the other, that of the lessee, enfranchised copyholder, or grantee of the mines.

Where the property consists of land of different tenures.—When property consists of lands of different tenures—as where some are freehold, and others of leasehold, or of copyhold tenure—a purchaser should be furnished with a separate abstract of each distinct species of property.

As to lands taken in exchange.—Where lands have been taken in exchange, whether at common law, or under mutual conveyances with eviction clauses, the practice has been to furnish an abstract of documents of title, both of the estates given and taken in exchange, down to the time of making such exchange. The reason of requiring a double title under assurances of this kind was, because the foundation of an exchange was an implied warranty, which engendered a right of entry in case of eviction: (Finch L. 27; Shep. Touch. 290.) The recent statute of 8 & 9 Vict. c. 106, has, however, deprived deeds of exchange of their property of creating any warranty or right of re-entry, or implied covenant by implication; but as the operation of this statute is only prospective, it will not affect any assurances made previously; so that, as far as any of those assurances are concerned, a double abstract will still be necessary.

As to exchanges made to the church, or under Inclosure Acts.—Where an estate has been taken in exchange under the acts authorizing the sale of ecclesiastical property (55 Geo. 3, c. 147, s. 53; 56 Geo. 3, c. 52; 1 Geo. 4, c. 6), or under an Inclosure Act, or the act 4 & 5 Will. 4, c. 30,

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authorizing the exchange of common lands, the title down to the exchange must be that of the estate given in exchange; but where the property has been taken in exchange under the Commons Inclosure Act (8 & 9 Vict. c. 118), it will, it seems, be sufficient to furnish a single abstract only; as that act contains an express provision that the award, when confirmed, shall be conclusive evidence that the directions of the act have been complied with, and declares that every allotment, exchange, &c., set forth in the award, shall be binding and conclusive on all persons whomsoever: (sect. 105.)

Of land taken in exchange from a charity.—In exchanges made under the act authorizing the sale of charity lands (1 & 2 Geo. 4, c. 92), a double abstract will be necessary, for the purpose of showing the title to the lands given, as well as those taken in exchange; for by that act, a right of re-entry in case of eviction is expressly given to the charity trustees: (sect. 9.)

Attendant terms.—With respect to terms of years attendant on the inheritance, it seems that, notwithstanding the statute 8 & 9 Vict. c. 112, has declared that all satisfied terms shall cease, it still seems necessary that the instrument creating them should be abstracted, and the terms themselves ought to be traced through all their subsequent dealings and assignments, for the purpose of showing in whom they were actually vested at the time they became subject to the operation of the act above alluded to. And where such assignments have been made by distinct instruments from the deeds of conveyance, they should form a separate abstract from that containing the title of the freehold and reversion upon which such terms were attendant.

4. *How the various documents should be set out.*

Documents should be abstracted according to the priority of their respective dates.—The several documents by which the title is to be supported should be abstracted according to the priority of their respective dates; and where there are two documents of the same date, they should then be abstracted according to the order in which they may be presumed to have been executed; as, for example, if lands were conveyed to trustees by one deed, upon trusts declared by another deed of the same date, the deed of conveyance to the trustee is the one which ought to be first abstracted. But where

separate parts of the estate are held under different titles, then the course of each separate portion must be traced separately, until the ownership of the whole unites in the same party. Thus, for instance, if there be three estates, A., B., and C., all held under different titles which have been purchased by D., then the title of each of these three several estates must be traced separately, as long as they remain distinct; but as soon as they become consolidated into one title by the conveyance to D., they will be traced together as long as the entire property continues to flow on in the same course. The like observations are also applicable where an estate in joint tenancy, or co-parcenary, has been severed, until the whole estate unites again in one common title.

Every document affecting the property should be abstracted.]

—Every document that can in any way affect the property should be abstracted, for a vendor's solicitor renders himself personally liable if he keeps back any document, or suppresses any incumbrance by which the true nature and real state of the title may be revealed (*Arnot v. Biscoe*, 1 Ves. sen. 96; *Burroughs v. Lock*, 10 Ves. 437; *Bowles v. Stewart*, 1 Sch. & Lef. 227; 1 Prest. Abs. 39); so that it will be necessary to notice judgments, and all other subsisting charges upon the property.

Abstracts of leaseholds.]—Where the property is leasehold, the abstract, in the absence of some express stipulation to the contrary, must, as we have previously remarked, disclose the lessor's title; in addition to which the original lease, and the mesne assignments, must be also abstracted. The amount of rent, and all outgoings must be set out, and all burdensome covenants abstracted very fully, but common covenants may be set out very briefly.

Abstracts of copyholds.]—In making out an abstract of title to copyhold property, the copies of court roll, which form the title of a copyholder, must be set out, and the copies of court roll themselves should be furnished to the purchaser, in order to give him an opportunity of comparing them with the abstract.

Deeds declaring the uses must be abstracted.]—All the deeds by which the uses of the copyholds are declared must be abstracted, as also the date of every surrender and admittance, and by whom and to whom they were respectively made.

Particular manorial customs must be set out.—Any particular manorial customs affecting the copyhold property must be mentioned; and where any estate tail has been barred, the mode in which it was done should be stated, for the purpose of showing that all the customary formalities have been duly complied with; and agreements which in any way affect the equitable title should also be shown: (1 Prest. Abs. 204.)

Where copyholds have been devised, it should be stated whether there was a previous surrender.—Whenever copyhold property has been devised by will, it should be stated whether or not there was any previous surrender to the use of the will. And it may be proper here to remark, that although, since the statute 55 Geo. 3, c. 192, a surrender is no longer necessary to give validity to a will, it must at the same time be borne in mind that that act is only prospective in its operation.

How the several clauses should be set out in the abstract.—In order that the various clauses may the more readily catch the reader's eye, it has long been the practice to distinguish the different parts of the abstracted documents by setting them out within margins varying from each other in breadth; hence an ordinary abstract has commonly four or five marginal spaces. In the outer space or margin merely the date of the instrument, and sometimes the amount of the stamp, is inserted. In the first inner space, or margin, the title of the document, as, "Indenture of Feoffment," or "Indentures of Lease and Release," with the names and additions of the conveying parties, are set out; the recitals contained in the instruments are commonly set out within the second marginal space; the testatum, or witnessing part, in the first; the granting part sometimes in the second, and at others in the third; the parcels in the fourth, and the general words in the fifth; the habendum in the second, the declaration of uses (if any) in the third; the trusts or powers (if any) either within the second or third margin; the covenants either in the first or second margins; and the clause noticing the execution, attestation, and indorsement of receipt of purchase money, within the fourth or fifth margin.

No precise rule laid down as to the manner in which the clauses are to be set out.—There is not, however, any precise rule laid down as to the manner in which the several clauses are to be set out; the chief object of the whole arrangement

being to enable the reader, at a single glance, to discover any particular portion of the abstracted documents; a method which materially assists the investigation of a lengthy abstract, where it frequently becomes necessary to refer backwards and forwards from one part of it to another.

Wills, how usually abstracted.]—Wills are commonly set out within the inner margin, but there is this objection to the arrangement, viz., that few instruments call for such frequent or lengthy marginal remarks from the peruser of an abstract as a will does, on account of the various objects it so often embraces, as also from the inartificial manner in which instruments of this kind are sometimes penned; and hence it occasionally happens that the marginal remarks of counsel, or whoever else peruses the abstract, are too voluminous to be contained in the outer marginal space that has been left unwritten on, and are consequently obliged to be extended to the back of the sheet, or carried on in the margin of the next, instead of being placed, as they ought to be, as near as possible to the particular clause to which they relate.

Acts of Parliament; chirographs of fines, and exemplifications of recoveries; matters of fact, &c.]—Acts of Parliament, as also chirographs of fines, and exemplifications of recoveries, are usually set out within the first margin; as are also most matters of fact, which in any way concern the title, as births, marriages, deaths, descents, failure of issue, or the like. In abstracting an act of Parliament the date of the royal assent must now be stated.

5. *Deeds, how to be abstracted.*

As to the date, and names and description of parties.]—In abstracting a deed, the date and title of the deed are first set out, with the names of the parties, who should be described by their Christian and surname additions, and places of abode, in the same manner as in the abstracted deed, as also any character they may in such deed be described as filling; as heir, executor, trustee, &c. This, indeed, is sometimes done, even when the parties are not described in the deed as filling any of the above characters; but under the latter circumstances, the additional description should be inserted within brackets, in order to show that the parties were not so described in the abstracted deed.

How the names and description of parties should be inserted.]

—In order the more readily to catch the eye in referring backwards and forwards to several parts of the abstract, it is a great assistance, particularly where the parties to a deed are numerous, to arrange them in different lines, as suggested by Mr. Preston, viz :

Between

A. B., of the first part.

C. D., of the second part.

E. F. and G. H., of the third part.

I. K., L. M., and M. N., of the fourth part.

&c. &c.

And thus, at a single glance, it will be seen whether or not a particular person is named as a party to a deed, which is not done so easily where a number of parties, with long additions and descriptions, are all arranged together in close order, filling up the whole space within the outer margin of the abstract.

Amount of stamp duties, how to be abstracted.]—The amount of the stamps impressed upon the various documents ought to be set out in the outer margin, immediately beneath the date.

As to the recitals.]—The recitals should be set out in the order in which they respectively occur in the abstracted deed, and should be abstracted with sufficient fulness to explain their whole purport ; but when this has been once done, it will be sufficient, whenever it again becomes necessary to notice such recitals, to state simply the name and date of the recited instrument (*e. g.*) : " RECITING the before-abstracted indentures of lease and release of the 20th and 21st days of October, 1803 ; ALSO RECITING the before-abstracted indenture of the 1st day of December, 1804," &c. &c.

The testatum clause.]—The testatum, or witnessing part, should state nature of consideration ; and where it consists of money, which is required to be paid in any particular manner—as in pursuance of the terms of any trust or power, for instance—then that part of the deed which points out such particular mode of application should be fully abstracted, for the purpose of showing that all the necessary requisites have been duly complied with : (1 Prest. Abs. 87.) Where the consideration is merely a nominal one, as *5s.*, or a pepper-corn, or the like, such consideration should be shortly stated.

Granting clause.—The granting clause should contain every word of conveyance that is employed there for that purpose, as, "grant, bargain, sell, alien, release, convey, ratify, and confirm," or whatever other terms may have been used, and not simply their effect and operation. But where the instrument speaks both in the past and present tense, it will be unnecessary to repeat the operative words.

Where there are distinct granting clauses, each should be abstracted according to its order in the deed.—If there are distinct granting clauses, each clause should be abstracted according to its order in the deed: (1 Prest. Abs. 75.)

Where parties convey in any particular manner, it must be so stated.—And where the conveyance is made at the request or by the direction of any particular person, or where a party is mentioned to have conveyed as heir, executor, trustee, &c., it should be so stated.

Where parties convey by appointment, power should be referred to.—So, where a party conveys in execution of a power, the reference to the power should be inserted, together with the prescribed mode in which it is directed to be exercised; as, where the instrument requires to be executed in the presence of one or more credible witnesses, and has been executed accordingly, it should be so stated.

Parcels.—The parcels, as we have already noticed (*ante*, p. 115), are sometimes set out in the heading of the abstract; but where this does not occur, they should be copied out *verbatim* from the first abstracted deed; and where the description is not varied in the subsequent instruments, it will be sufficient to refer to them briefly, as, "all before-abstracted premises." But where the description has been afterwards varied, such variation should always be noticed: (1 Prest. Abs. 81, 83, 84.)

Exceptions.—All exceptions reserved by the abstracted deed should be set out *verbatim* in the same margin, in the order in which they occur, immediately following the parcels.

How habendum clause should be abstracted.—In abstracting the habendum clause the first three words of it are omitted, and it commences with the words, "To hold," &c.; but the

words of limitation ought to be inserted *verbatim*, just as they occur in the abstracted deed; as, for example,—

“To HOLD the said premises, with their appurtenances, unto the said A. B. and his heirs [*or* heirs and assigns, as the case may be], to the only proper use and behoof of the said A. B., his heirs or assigns, for ever;”

or,

“To HOLD, &c., unto and to the use of the said A. B., his heirs and assigns for ever;”

and not simply inserting the effect and operation of the above-mentioned expressions.

How limitations to uses to bar dower should be abstracted.]—Where the premises have been limited to uses to bar dower, the limitations should be recited with sufficient fullness to show the particular mode in which those limitations have been penned, and it will be incorrect to state simply, as is sometimes done, that the conveyance was to “A. B. in fee,” or to “A. B. and his heirs,” to the usual uses to bar dower, for there are several minute forms of uses to bar dower, varying from each other in some essential particulars. As, for instance, the mode of executing the power of appointment reserved to the purchaser, which is sometimes directed to be attested by a certain number of witnesses; sometimes to be executed by any deed or instrument in writing; sometimes power to appoint by will is given, at others omitted, and sometimes is confined to a deed only, and no particular number of witnesses are prescribed; so that, under the general terms above alluded to, it would be impossible for any one to know precisely what the exact uses were, which becomes very important in a title which depends upon the validity of any appointment made under the power, which would be ineffective if the terms of such power have not been duly complied with; as, where it requires that the instrument of appointment shall be attested by two witnesses, which turns out to have been attested by one witness only.

Habendum clauses, where there are several, how to be abstracted.]—If the abstracted deed contains several habendum clauses, then each of these must be set out in the abstract according to the respective order in which it stands in the deed.

As to the reddendum clause.]—Where there is a reddendum clause, it may be abstracted shortly, unless the rent is made

payable in any particular manner; but in the latter case, the manner in which it is payable should be fully stated: (1 Prest. Abs. 101.)

Practical observations upon abstracting the declaration of uses.—It requires both judgment and skill to abstract the clause of declaration of uses, where it contains any kind of special limitations, in order, on the one hand, to avoid loading the abstract with unnecessary verbosity, as on the other, to omit nothing really essential to the elucidation of the title. In the instance of estates tail, for example, the precise words of limitation creating the first estate tail, as also of any estate tail upon the barring of which the title depends, should be fully abstracted, whilst at the same time the remainders, if any, which have been barred, may be simply stated as such.

Precise words should be abstracted where untechnical expressions are made use of.—In all cases where the strict technical words of limitation have not been used, or an estate only arises by implication, the precise words should be copied *verbatim* in the abstract, and this notwithstanding no doubt whatever exists as to their legal effect and operation.

How trusts or powers should be abstracted.—Whether trusts or powers should be fully or concisely abstracted, will depend entirely upon whether such trusts have arisen, or such powers have been or are intended to be exercised. If such trusts have arisen, they must be abstracted fully, as must also powers, where they have been, or are intended to be acted on; but if such trusts have never arisen, or, after having arisen, have been afterwards effectually defeated; as, where they were only to take effect in the absence of the exercise of a power of appointment, which appointment has been actually made; or if powers have not been exercised, or are barred, released, or extinguished, or incapable of taking effect, or are in their nature immaterial to the title, it will be sufficient, instead of abstracting such trusts or powers at length, simply to refer to them: (1 Prest. Abs. 151.)

Clause of indemnity to purchasers, how to be abstracted.—Where trusts or powers of sale have been carried out and executed, the clauses (providing there be any such in the instrument) exonerating the purchaser from seeing to the application of the purchase money, or from inquiring into the necessity or expediency of the sale, or the performance

of any act or condition precedent or concurrent with the sale, should be abstracted rather fully: (1 Prest. Abs. 151.)

Proviso for redemption.—When the abstracted instrument is a mortgage, the proviso for redemption should be fully abstracted, and where any time or place of payment is appointed, it should be so stated.

For cessor of terms.—Provisoes for the cessor of terms, when any such occur, in the abstracted deed, should always be abstracted; and where they are considered to have operation should be abstracted more fully than is usually done: (1 Prest. Abs. 143.)

Usual covenants should be abstracted briefly.—The usual covenants in deeds may be abstracted very briefly, as for example, “covenants from vendor that he was seised in fee; that he has good right to convey; for quiet enjoyment; freedom from incumbrances, and for further assurance.”

Special covenants should be fully abstracted.—But where the abstracted instrument contains any covenants of an unusual or a special nature, they should be abstracted fully, and the whole terms clearly set out, so that a purchaser cannot possibly be misled by them.

How attestations and memorandum of receipt clauses should be abstracted.—With respect to the attestation and memorandum of receipt clauses, it should be stated by what parties the deed is executed, and if any one or more named in it have omitted to do so, that fact should be mentioned. Omissions of this kind frequently occur where a dower trustee has been named as a party to the conveyance, whose actual concurrence not being essential to pass the whole estate and interest intended to be thereby conveyed, is often unattended to; but however immaterial his concurrence may be, the fact of his non-execution must, nevertheless, be noticed; for every fact in any way connected with the title should be stated precisely as it occurs. For the same reason, therefore, if the instrument abstracted has been executed in any particular manner, it ought to appear on the abstract to have been executed accordingly. For example, where a power has been exercised in pursuance of some specific requisitions imposed by the instrument creating it, the particular mode of execution should be stated, in order to show that the terms of the power have been strictly complied with. So,

where any act or thing is required to be done beyond the simple act of sealing and delivering the deed ; as livery of a seisin upon a feoffment, or enrolment upon a deed of bargain and sale, or a disentailing deed, or where some act is required to be done to give validity to the assurance, as the acknowledgment of a married woman under the Fine and Recoveries Substitution Act (3 & 4 Will. 4, c. 74), such of those facts as have taken place should always be mentioned. Nor, indeed, will simply doing this be sufficient in all cases, for in some of them, at least, as bargains and sales, or disentailing deeds requiring enrolment within six months after execution, the time at which the acts were performed must be also stated ; and if lands lie in a register county, and the deeds or other assurances have been duly registered, it should be so stated.

In feoffments manner in which livery of seisin was given must be mentioned.—In the instance of a feoffment, the manner in which livery of seisin was given or received, as by attorney, or with the consent of the tenants, where the lands are on lease, as the case may be, ought to be indorsed on the deed ; and if this has been done it should so appear on the abstract. And in this, and in fact in every other case where a deed has been executed by attorney, it will not be enough merely to mention that fact, but the power of attorney itself should be abstracted, though this may be done very briefly.

As to memorandum of receipt of purchase money.—To the attestation there should be annexed a memorandum that the receipt of the consideration money is indorsed, and if signed and witnessed according to the modern practice now universally adopted, those facts should also be mentioned : (*Rountree v. Jacobs*, 2 Taunt. 141 ; 1 Prest. Abs. 72.)

As to attendant terms.—We have already noticed that although attendant terms have by a recent enactment (8 & 9 Vict. c. 112), been directed to cease, it is still necessary to show the creation and subsequent dealings with the term down to the time it became subject to the operation of this act ; in so doing, that portion of the instrument by which the term is created should be recited rather fully, but the mesne assignments may be very briefly recited : (1 Prest. Abs. 25.)

6. *Wills.*

Wills, how to be abstracted.—The date of the will itself, and not the time at which it is proved, should be set opposite to the commencement of the will in the outer margin of the abstract.

Should be abstracted more fully than a deed.—A will should always be abstracted more fully than a deed, and every term or expression that can in any way affect the premises should be abstracted.

Words of limitation should be set out.—All words of limitation by which the several estates under the will, so far as the same in any way relate to the abstracted premises, should always be set out, and not simply their effect stated; and this the more particularly when any untechnical expressions have been used.

How conditions and provisoes should be abstracted.—All conditions and provisoes of modification, and every special matter the will contains respecting the abstracted premises, should be stated with clearness and accuracy.

Where the property is charged with the payment of debts and legacies.—But where the property is devised upon trust to pay debts and legacies, or other charges, it will not then be necessary to set out and specify the legacies; because where real estate is charged with the payment of debts, the devisee may always sell in order to pay them; and unless such debts are specified and scheduled, the purchaser is exonerated from seeing to the application of his purchase money (3 Prest. Abs. 360), but if such debts be scheduled, or even specifically mentioned in the will, the purchaser will be responsible for the application of the purchase money, and must see that it is applied in liquidation of those charges, unless the will should contain an express clause, which all well-drawn wills do, exonerating purchasers from seeing to the application of their purchase moneys.

Purchaser exonerated from seeing to the application of purchase moneys upon a sale of leaseholds.—Neither will the rule requiring a purchaser of real estate to see to the application of his purchase money, where the property is sold for the purpose of paying specified debts, apply to the sale of leasehold property sold by executors in that character, they being by law intrusted with a power of converting the

personal estate of their testator into money for the purpose of paying his debts, the application of which a purchaser has no right to interfere with; consequently, from actual necessity, as well as in common justice, he is exonerated from seeing how it is laid out, beyond the liquidation of those charges upon the property which are independent of the will, as mortgages or other charges thereon anterior to the will: (Butl. note to 1 Ins. 290; 3 Prest. Abs. 259, 260.)

Probate of will.—The fact of probate should be set out at the foot of the will, stating the court in which it was proved, and by whom; as also the day of the month and year in which such probate was obtained.

Where executors have declined to act.—In case any of the executors have renounced, or declined to prove the will, the facts must be stated accordingly; and if such renunciation was made by deed or any other instrument, it will be necessary that such deed or instrument of renunciation should be abstracted.

Where the lands lie in a register county.—If the devised lands lie within a registered county, and the will has been registered, the fact of registration should be stated: (1 Prest. Abs. 182, 185.)

7. Acts of Parliament, fines and recoveries, and matter of fact concerning the title.

Acts of Parliament.—Where there is any private act of Parliament relating to the title, the usual practice is to make a very short abstract of it; in fact, little more than merely referring to the act itself, the printed form of which should always be forwarded with the abstract.

Fines and recoveries.—In abstracting fines and recoveries, the practice is to set out in the outer margin the term, and the reign of the king or queen for the time being in which they were levied or suffered, as "Hilary Term, 40 Geo. 3," instead of the day of the month and year in which those assurances were made.

Fines, how to be abstracted.—In the case of a fine, the abstract should specify what particular kind of fine it was, as *sur cognizance de droit come ceo*, &c., or *sur concessit*, or otherwise, as the case may be; it should also contain the

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names of parties, viz., conuzor, conuzees, as also the description of the parcels, with its local situation, in precisely the same terms as the same are set out in the fine itself.

Exemplification of recovery.—In abstracting the exemplification of a recovery, the names of the demandant, tenant, and vouchee, and the course and order in which they were respectively vouched, as also all the parcels, with their local descriptions, as well as the time at which the writ of seisin was returnable, and seisin delivered should be all inserted.

Judgments.—It was not formerly the common practice to abstract judgments, and notwithstanding the observation of Lord Kenyon in *Richards v. Barton* (1 Esp. N. P. C. 217), that an abstract ought to mention every incumbrance whatever affecting an estate upon which any security was to be placed, and should therefore contain an account of every judgment by which the estate was affected, his opinion was not adopted by the profession so long as judgments continued to be a mere general lien on the land. But ever since the statute 1 & 2 Viet. c. 110, has made judgments an actual charge upon the lands, it has become necessary, and been the usual practice for the vendor's solicitor to abstract them in the same manner as any other charge upon the property.

Decrees and decretal orders.—Decrees or decretal orders, where they affect the property in any way, should be abstracted, and wherever there has been any reference to the Master upon any point relating to the title, his report, together with the order or decree thereupon, should be stated.

Administration.—Where letters of administration have been granted, the date should be set out in the usual way in the margin, and it should be mentioned whether they were general or special, as also the name of the court out of which they were obtained, and to whom granted.

Proceedings in bankruptcy.—In abstracting a commission or fiat in bankruptcy, prior to the statute 1 & 2 Will. 4, c. 56, it was requisite to abstract the commission, commencing with the date, which was inserted in the usual manner in the outer margin, and then setting out the commission, or fiat, and the names of the commissioners, with

the clause of *quorum*, in order that it might be seen whether the commissioners have duly exercised their authority, as also the deed of bargain and sale of the commissioners: (1 Prest. Abs. 166.) But as the property of the bankrupt since the passing of the act above alluded to vests in the assignees without any other conveyance, the recital of the trading, and act of bankruptcy, as also the appointment of the assignees, in all cases where the bankruptcy has been subsequent to the act's coming into operation, should be set out rather fully; although this will be less essential where the bankrupt himself has concurred in the conveyance, as in that case he would be estopped from disputing any of the above facts.

Insolvency.—When the title is traced through an insolvent, if the proceeding were prior to the statute 1 & 2 Vict. c. 110, the time of the presenting and filing of the petition by the insolvent, the conveyance and assignment by such provisional assignee to the creditor's assignee must be set out in the abstract; and all these assurances, which are filed of record in the court, must be authenticated by a copy of such record made upon parchment, under the seal of the court: (Stat. 7 Geo. 4, c. 57, ss. 11, 19.) If the proceedings were subsequent to the statute 1 & 2 Vict. c. 110, the order made under the last-mentioned act, duly entered upon record of the petition of the insolvent, or upon the petition of an execution creditor, vesting the estate and effects of the insolvent in the provisional assignee, and likewise the order appointing the creditor's assignee, must be set out in the abstract, and also verified by such certified copy written out upon parchment, under the seal of the court. And where any conveyance of an insolvent would require to be registered, in that case, as the certified copy should be registered in the same manner as an ordinary conveyance, the fact of registration should be mentioned in the abstract.

As to proceedings in insolvency under statute 5 & 6 Vict. c. 116.—If the proceedings are under the act 5 & 6 Vict. c. 116, which authorizes the Court of Bankruptcy to administer relief to insolvent debtors at large, the abstract should set out the insolvent's petition for protection from process, the nomination by the commission of the official assignee, and then the final order made by the commissioner for the protection of the person of the insolvent from all process, and for the vesting of his estate and effects in the official and creditor's assignees. As this act requires a

meeting of the creditors to be called before the assignees can sell the real estate, the fact of the meeting having been held, and the resolution of the creditors approving and directing the sale, ought also to appear upon the abstract: (*Sidebotham v. Barrington*, 4 Beav. 110; *Wright v. Maunder*, ib. 512.)

Matters of fact.—Matters of fact, such as marriages, births, and deaths, should be inserted in the order in which they occur, and the certificates, if any, by which such facts are authenticated, with the respective dates, must also be set out in the abstract.

Descents.—Descents should be proved by an authenticated pedigree containing the names of the parties, and the dates of their births, marriages, and deaths, as also of the respective ages at which each of them died; all of which facts should be copied *verbatim*. It is also a usual and very proper practice to insert the name of the particular parish or place at which each of the deceased parties was buried.

Seisin.—In the above, as in every other case where it is important to show seisin in any of the parties, extracts from ancient leases, or land tax, or poor rate assessments, or such other evidence of ownership as can be produced, should be mentioned in, and accompany the abstract, for the purpose of showing by whom, and in what manner, the property has been enjoyed.

Cancellation, alteration, or erasure of documents.—No fact or circumstance whatever connected with the title should be omitted, simply because such fact or circumstance will not have the effect of invalidating it. Take, for example, the case of a cancellation of a deed, which, notwithstanding any fluctuation of opinion that may formerly have been entertained on the subject, it is now settled will not annul it, or restore the estate to the former proprietor: (*Magennis v. McCullough*, Gilb. Eq. Cas. 253; *Doe dem Courtail v. Thomas*, 9 B. & C. 288). Still a fact of this kind ought to be noticed in the abstract. Neither must a disclosure be withheld, even where it might tend to prejudice the title. Hence, if an alteration or erasure has been made in any instrument subsequent to its execution, that fact ought to be mentioned, together with all the circumstances under which it was done, and more particularly so, as a fraudulent alteration by either of those means, if made

by the person himself taking under it, would vitiate his interest altogether. It was indeed formerly considered that an alteration, erasure, or interlineation would avoid the whole instrument, even in those cases where it was made by a stranger; but the law is now otherwise, as it is clearly settled that no alteration made by a stranger will prevent the contents of an instrument from retaining its original effect and operation, where it can be plainly shown what that effect and operation actually was. To accomplish this, the mutilated instrument may be given in evidence as far as its contents appear, and extrinsic evidence will be admitted to show what portions have been altered or erased, as also the words contained in such altered or erased parts; but if, for want of such evidence, or any deficiency, or uncertainty arising out of it, the original contents of the instrument cannot be ascertained, then the old rule would become applicable, or more correctly speaking, the mutilated instrument would become void for uncertainty: (1 Prest. Abs. 156, 157.) In a recent case (*Doe ex dem Tatham v. Gattamore*, 17 L. T. Rep. 74), it was held that an erasure or interlineation appearing on the face of a deed is to be presumed, unless the contrary is shown, to have been made at the time of the execution of the deed.

8. *Statement at the foot of the abstract.*

How the statement at the foot should be penned.—It is the proper, although by no means the general, practice to state at the end or foot of the abstract whether the vendor be married or single, and if married, whether his marriage took place prior to the year 1834, in order to show whether or in what manner his wife's right of dower may have attached on the abstracted premises. The abstract should likewise be accompanied by a statement of all matters relative to the legal character and station of every party interested in the property which do not appear on the face of the abstract, in order that the peruser of it may be enabled to ascertain with precision everything that is in any way connected with the title, and to point out the best mode of assurance to the purchaser without the necessity of calling for any further information: (1 Bart. Prec. XXXVII.)

II. DELIVERY OF THE ABSTRACT.

Vendor's solicitor should deliver abstract at the appointed time.—The vendor's solicitor, whenever any particular time

is appointed for the delivery of the abstract, should take care to prepare and deliver the same accordingly. An omission to do this would at law, authorize the purchaser to annul the contract (*Powell v. Pillett*, Gilb. Rep. 188; *Berry v. Young*, 1 Esp. N. P. C. 640); and in equity, also, where time is made part of the essence of the contract (*Bochin v. Wood*, 1 Jac. & Walk. 239; *Levy v. Lindo*, 3 Mer. 84); but in the absence of a stipulation to the latter effect, a purchaser will not be released from his contract by such non-delivery, if he neglects to apply for the abstract within a reasonable time before the day appointed for its delivery (*Jones v. Price*, 3 Anstr. 942), or if, upon its being afterwards tendered to him, he makes no objection to receive it on account of the delay: (*Seton v. Slade*, 7 Ves. 265.) Yet, even in equity, if a vendor neglects to prepare and deliver the abstract when pressed by the purchaser so to do, the latter will be entitled to avoid the contract as soon as the time fixed for completion is elapsed: (*ib.*)

When abstract should be delivered where no time of delivery is appointed.]—Even where no precise time is fixed for the delivery of the abstract, it ought to be delivered in a convenient time, although what limit is to be so considered is involved in doubt; the best and safest course, therefore, will be to deliver it without any unnecessary loss of time, as delay on the one side will form a reasonable pretext for the same line of conduct on the other, which, in ninety-nine cases out of a hundred, will be either more or less prejudicial to a vendor's interests.

Memorandum of time of delivery should be made.]—When the abstract is delivered, a memorandum of the day of the month and year of such delivery should be immediately noted by the party making such delivery, and retained by the vendor's solicitor, for the purpose of assisting the party's memory at any future time, in case it should become necessary to prove the time when such delivery actually took place.

Purchaser's solicitor should demand abstract, if not delivered in proper time.]—And as, on the one hand, a vendor's solicitor should be careful to deliver the abstract in proper time, so, on the other, the purchaser's solicitor should be equally vigilant; and whenever a time is specified for such delivery, the latter should make a point of demanding it on or before the specified day. It is not solely incumbent on

the vendor to move by making a tender of the abstract; it is in some degree, also, incumbent on a purchaser's solicitor to ask for it (*Guest v. Homfray*, 5 Ves. 283); and any laches on the part of the latter to do this, may afford ground for rescinding the contract, even where no actual time is appointed for the delivery of the abstract, if any considerable time has been allowed to elapse without any such demand having been made: (*Harrington v. Wheeler*, 4 Ves. 686.)

Vendor may be compelled to furnish an abstract.—Should a vendor refuse or neglect to deliver an abstract, a court of equity will compel him to do so; nor will a vendor be allowed to substitute a delivery of the deeds themselves in the place of an abstract, and if he attempts to do so, the purchaser should immediately return the deeds, and insist upon being supplied with a proper abstract at the vendor's expense: (1 Prest. Abs. 34.)

Course purchaser's solicitor should pursue where he refuses to receive abstract for non-delivery in proper time.—If a purchaser's solicitor is desirous of relying upon the non-delivery of the abstract on the appointed day, or if no day has been named within a reasonable time before the day fixed for the completion, he should refuse to receive it; or if it be forwarded to him in such a manner, or under such circumstances, as to afford him no opportunity for making such refusal, he should return it, unperused, as soon as possible: (*Seton v. Slade*, 7 Ves. 265.)

How to act where willing to complete contract.—Still, if the purchaser should be willing to complete the purchase, provided it can be done at the appointed time, but to rescind it altogether if this cannot be accomplished, his solicitor, at the same time that he returns the unperused abstract, should offer to receive it again, yet without prejudice to the purchaser's right to rescind the contract if, upon the investigation of the title, it should be discovered that it is impossible to complete the contract within the time originally appointed, or at some other specified period.

III. THE PERUSAL OF THE ABSTRACT BY PURCHASER'S SOLICITOR.

Objects to be kept in view in the perusal of an abstract.—The principal objects to be kept in view in perusing an abstract of title, are—

1. To see that the title is carried back sufficiently far.
2. To discover the legal operation of the various instruments, as well as the capacity of the several parties, always bearing in mind that the same terms, when used in various instruments, have often a different force and operation; as, for example, a limitation to A. and his heirs *to the use of* B., his heirs and assigns, which, when contained in a deed of grant and release, will vest the legal estate in B., will only give him an equitable estate when contained in a deed of bargain and sale, or of appointment executing a power; and many terms which, in a will, are capable of passing a fee simple estate, will pass a mere life interest when contained in a deed; and at the same time, it must be remembered that the same expressions, when applied to property of different tenures, as freehold and leasehold, will frequently receive a different construction, and the same words which would pass only a life interest or an estate tail in freeholds, will often pass the absolute interest in leasehold or other personal property. (*Bennett v. Lewknor*, Roll. Rep. 356; *Crawford v. Trotter*, 4 Mad. Rep. 360; but see *Forth v. Chapman*, 1 P. Wms. 663, and *observations thereon*, 1 Hughes Pract. Sales, 2nd edit., 321.) It must also be recollected that the same words also may pass a different interest when they relate to an equitable, than they would if applied to a legal, estate (*Papillon v. Voice*, 2 P. Wms. 471); or where applied to persons standing in a particular degree of relationship to each other: (*Morgan v. Griffiths*, Cow. 234.)
3. That there is a clear deduction both of the legal and equitable estate.
4. That all particular estates are either determined, or are capable of being conveyed to the purchaser, or otherwise disposed of, so as to enable the vendor to confer a good and unimpeachable title, in pursuance of the terms of the contract.
5. To ascertain if there are any charges or incumbrances affecting the property, and if so, whether they are of such a nature that the vendor is unable to discharge them, or of a kind that he can get in, and thus pass an unincumbered estate to the purchaser; or in other words, whether the incumbrances are matters of title, or of conveyance only, a subject upon which we shall enter more fully hereafter.
6. It must be seen that the parcels comprised in each particular instrument under investigation are the same as were comprised in the former documents; and if the identity is not sufficiently disclosed by the abstract, it must be authenticated by extrinsic evidence; such as poor rates, or land tax assessments, when, if it should appear that such assessments

have been made without any variation, except in the change of the owner's name, it may reasonably be presumed that all is right.

Analysis will tend to assist investigation.—By making an analysis of the abstract, the labour of investigating the title will be both simplified and accelerated. This, in ordinary cases, may be done in the following simple manner :

"1796. 3rd & 4th June. Indres. of le. and rele. Rele., A. B. conveyed to C. D. in fee. 1800. Oct. 7th, C. D. devises to E. F. in fee. 1801. Nov. 10th, testator died. 1802. Jan. 17th, will proved in Prerog. Court of Canterbury. 1803. 1st and 2nd March, E. F. conveys to I. H. in fee to uses to bar dower. 1805. 12th May, I. H. mortgages in fee to J. L. by appointment;"

and thus continue to set out the various instruments according to their respective dates and order.

Inquiries to be made when any important document is omitted.—After making an analysis of the abstract, the peruser's attention should be particularly directed to see whether every document necessary to the elucidation of the title is there set forth; and if it should appear that any are omitted, or simply referred to, or merely mentioned in the recitals, their production should be insisted on. This frequently occurs where persons seised in fee have left wills, but have made no disposition thereby of the abstracted property; in which case the will itself, or a probate copy, ought to be produced, as affording the most satisfactory evidence of that fact, as well as to show that it contains no words of general devise sufficient to comprehend such property.

Inquiry should be made as to marriage settlement.—Inquiry should also be made as to whether any owners of the property executed a marriage settlement, and if so, the production of it should be required, in order to ascertain whether or not the abstracted premises are in any way affected by it; and nothing should be taken for granted where proper evidence of the fact can be procured.

Bare statements never to be relied on.—It is never safe to rest satisfied with the bare statement in the abstract of the fact of "fine levied," or "recovery suffered accordingly;" but the production of the chirograph of the fine, or exempli-

fication of the recovery, should always be insisted on. And every other stated fact should be supported by the proper evidence.

Requisitions and inquiries to be inserted in margin.—Where any facts mentioned in the abstract require to be substantiated by evidence, it will be proper to insert a requisition to that effect in the margin; as, for instance, letters of administration as evidence of intestacy; office copies of wills to prove the appointment of executors and probate by them; as also certificates of marriages, births, baptisms, or burials, where the proof of those facts becomes necessary to establish a pedigree, or any other fact or circumstance connected with the title. So, where a deed has been executed by attorney, the production of the power of attorney should be called for, as also proof that the principal was living at the time the power was executed. In like manner, an inquiry may be entered in the margin when certain acts necessary to be done have been performed accordingly, but such facts do not appear on the face of the abstract: as, whether, in case the property lies in a register county, the deeds have been registered; whether, if the deed is a bargain and sale, or a disentailing assurance under the Fine and Recovery Substitution Act, those instruments have been duly enrolled; whether, in the case of a feoffment, livery of seisin has been given; whether a deed requiring the acknowledgment of a married woman has been acknowledged accordingly; whether the terms of a power have been strictly complied with; and whether, if the instrument is a will made subsequently, or coming within the operation of the new Will Act (1 Vict. c. 26), both the attesting witnesses were present at the time the testator executed it, as also whether the latter signed his name at the right place. And this inquiry will be equally necessary, whether the will be made in execution of a power or under ordinary circumstances.

When any unaccountable act has been done, inquiry becomes necessary.—Whenever any unaccountable circumstance appears on the abstract—as, where any act is done without an apparent reason, as where a feoffment has been made, a fine levied, or a recovery suffered without any ostensible cause—it is sufficient to arouse suspicion, and an inquiry should always be made why any of those assurances were entered into. Where a deed has been delivered as an escrow—a practice certainly more common in former times than at the present day—full inquiries should be made, until it has

been satisfactorily ascertained that every condition has been performed, and that the second delivery has taken place.

Propriety of perusing the whole abstract before inserting inquiries in the margin.—Before, however, inserting any queries whatever in the margin, the better course will be to peruse the whole abstract through, when it will often be discovered that many of the requisitions have been subsequently complied with, and thus the margin will not be filled with unnecessary requisitions which, when found to have been complied with, ought not to incumber the margin of the abstract. If, however, they have been inserted there, they ought not to be thoroughly obliterated, but merely run through lightly with a pen, so as to render it still legible, but merely for the purpose of showing what the marginal observations really were, as also to show that they were afterwards expunged as being unimportant and unnecessary.

Costs of purchaser's solicitor for perusing abstract.—The costs of purchaser's solicitor for perusing an abstract of title is 6s. 8d. for every three sheets; he is also entitled to 6s. 8d. for attending counsel with the abstract: (Gill, Costs, 354.)

Fees of counsel.—The fees of counsel for perusing an abstract are 1l. 1s. for every six sheets.

IV. AS TO THE PROPRIETY OF SUBMITTING THE ABSTRACT TO COUNSEL.

Usual practice as to submitting abstract to counsel.—In London, the usual practice is to submit the abstract, in every case, to the opinion of counsel; but in the country the practice is different, and many offices never think of laying an abstract before counsel unless some question or difficulty arises upon the title. In many cases, indeed, a reference to counsel would only be incurring unnecessary expense, as where the title is well known to be good, or has been recently investigated by counsel, when a re-investigation would be superfluous; or where the title is so simple that any one possessed of the slightest legal knowledge would be capable of deciding upon its validity.

If title is at all complicated, abstract should always be submitted to counsel.—If the title is in the least degree complicated, the abstract should always be submitted to counsel.

Strictly speaking, it is considered the duty of a purchaser's solicitor to submit the abstract to counsel in every instance; and it is only by so doing that he can shelter himself from becoming personally responsible for any loss or prejudice his client may sustain in consequence of his accepting a bad, incumbered, or unmarketable title: (*Brooks v. Day*, 2 Dick. 572; *Williams v. Jay*, 11 L. T. Rep. 85.)

Counsel's opinion exonerates purchaser's solicitor from all responsibility, when.—But if the abstract is submitted to counsel, and he advises that the title is a safe and marketable one, the purchaser's solicitor, acting upon such advice, is discharged from all responsibility, however defective the title may eventually turn out to be. Nor does the counsel render himself liable to make good any loss sustained or injury incurred to the purchaser in consequence of his erroneous opinion.

Remedies against solicitors for negligence, when barred.—The remedy against a solicitor for any neglect or default of the above kind will be barred by the Statute of Limitations (21 Jac. 1, c. 16), six years after the commission of such act of negligence or default, without reference to the time the actual damage was sustained in consequence; consequently if the damage did not accrue within the six years, all remedy against the solicitor is for ever barred: (*Short v. McCarthy*, 3 B. & A. 626; *Howell v. Young*, 5 B. & C. 259; S. C. 2 Car. & Pay. 238.)

Copy of contract or conditions of sale should be forwarded to counsel with abstract.—Wherever an abstract is submitted to counsel on behalf of a purchaser, it should be accompanied with a copy of the conditions of sale, where the property has been sold by auction, or of the agreement, where the sale has been entered into by private contract, in order that counsel may discover whether such conditions, or agreements, contain any special stipulations debarring a purchaser from calling for such a title, or evidence of title, as a purchaser under ordinary circumstances would be entitled to require or call for.

V. OF THE OBJECTIONS TO, AND REQUISITIONS ON TITLE.

Purchaser's solicitor should either approve of title, or deliver his objections or requisitions to vendor's solicitor.—The purchaser's solicitor having, from a perusal of the

abstract, or from the opinion of counsel to whom it has been submitted, ascertained how far the vendor is capable of making a good title, should, if he approves of the same, give early notice thereof to the vendor's solicitor. If he objects to the title, or requires anything further to be done in elucidation of it, or evidence to support it, or any questions answered upon any matters connected in any way therewith, he should forward such objections or requisitions to the vendor's solicitor, within the time appointed by the contract or conditions of sale; or, if no time be appointed, within a reasonable time, insist on having such objections removed, or the requisitions complied with.

Objections or requisitions must be forwarded within appointed time.]—It is important that the purchaser's solicitor should send his objections or requisitions within the time appointed by the contract or conditions, and this more particularly where it is stipulated that, in default of a purchaser's so doing, he shall be taken to have accepted the title unconditionally; otherwise, it seems, the purchaser will be held to his bargain, and bound to accept the title as he finds it, and will no longer be entitled to call for the removal of any objection, or compliance with any requisition he may make.

Purchaser should be careful to confine his requisitions to such as he is entitled to demand.]—The requisitions should be restricted to the production of such documents or evidence only as a purchaser is really entitled to require; for where a purchaser had called for more than a vendor was bound to furnish him with, and the latter, considering the purchaser would not be satisfied with what he was entitled to, had not afforded the necessary information, a specific performance was decreed on a good title being made out, without costs on either side: (*Newall v. Smith*, 1 Jac. & Walk. 263.)

Requisitions must be neither frivolous nor unnecessary.]—Care also must be taken that the objections or requisitions are neither frivolous nor unnecessary, as conduct of this kind is looked upon with an unfavourable eye in a court of equity, and may even be the cause of a purchaser so acting being refused a specific performance, which would otherwise have been decreed him, or which, if granted him, will be without any costs: (*Newall v. Smith*, *suprà*; *Allen v. Martin*, 5 Jur. 239 R.)

How requisitions are usually prepared.—The requisitions are usually made out on sheets of foolscap paper arranged in double columns; on that upon the left side are contained the objections and requisitions, with an open space left on the opposite side for the vendor's solicitor to insert his answers; this being forwarded to the latter, he inserts his replies opposite to the several requisitions, and returns it again to the purchaser's solicitor.

How the vendor's solicitor must proceed in answering the objections.—Before a vendor's solicitor proceeds to remove any objections, or to comply with the terms of any of the requisitions, he should demand of the purchaser's solicitor whether or not these are the only matters objected to, or the only requisitions to be insisted on; for it not unfrequently happens that, when a purchaser is unwilling or unable to complete his contract at the appointed time, his solicitor has continued to raise frivolous objections to the title, or to demand a number of unnecessary requisitions, for the mere purpose of spinning out the time, until the purchaser can either raise the money to pay for the property, or procure some sub-purchaser to take the bargain off his hands. Devices of the latter kind have often been successfully practised by land jobbers, who have entered into the contract upon speculation, without either the means or intention of completing it, but depending entirely upon selling at a profit to sub-purchasers, and thus contrive to keep the contract going on for the purpose of saving the forfeit of their deposit.

Advantages of vendors reserving a power to rescind sale when purchaser makes requisitions he cannot comply with.—For this amongst other reasons it is always, as we have previously remarked, prudent for a vendor to reserve to himself, either by the terms of his contract or conditions of sale, a power of rescinding the contract in case a purchaser shall raise any objection to the title, or make any requisitions respecting the same; to which should be added, that the vendor's right to do this shall not be affected by any attempt to remove such objection or to comply with any requisition; otherwise, as we have already seen, any subsequent negotiation relating to any of these matters will be considered as a waiver on the vendor's part of his right to rescind the contract; and, even where this clause is inserted, a vendor should never attempt to remove any such objections or comply with such requisitions, but under express protest that he

does so without prejudice to his right of rescinding the contract.

The costs a purchaser's solicitor is entitled to for drawing requisitions upon title is 1s. per folio : (Gib. Costs.)

Approval of title as appears from abstract no waiver of objections to title otherwise disclosed.]—The having approved of the title as it appears on the face of the abstract will not deprive a purchaser of his right to have the abstract verified with the title deeds (*Southby v. Hutt*, 2 Myl. & Cr. 217; *Blacklow v. Laws*, 2 Ha. 47), or to make any objections or requisitions which the abstract does not disclose, and which afterwards become known to him : (*Sidebottom v. Barrington*, 3 Jur. 947.)

Agreement to waive all objections but one, if that objection be removed.]—And where a purchaser, having made several objections, agrees to withdraw all of them but one, and accept the title, provided that one is removed, the waiver of the other objections will be construed as conditional on the objection being so removed; and if this be not done, the purchaser, upon a bill filed against him for a specific performance, will be entitled to a general reference of title : (*Lesturgeon v. Martin*, 3 Myl. & Kee. 255.)

VI. OF THE TITLE A PURCHASER MAY REQUIRE.

1. When a purchaser may insist upon a specific performance *pro tanto* with compensation.

2. When a vendor may compel specific performance with compensation, when unable to complete the contract to its fullest extent.

1. *When a purchaser may insist upon a specific performance pro tanto with compensation.*

Title must be free from all doubt or suspicion.]—A purchaser is entitled not only to a safe holding title free from any kind of incumbrance, but also to a title clear of all doubt and suspicion; for if a doubt arises upon its validity the purchaser may annul the contract; nor can any extent of indemnity which a vendor may offer, and have the ability to confer, vary the rule the slightest degree in this respect.

Purchaser cannot claim indemnity for a doubtful title.]—And as, on the one hand, a vendor cannot compel a pur-

chaser to take a doubtful title with an indemnity, so on the other, the purchaser cannot call upon the vendor to give him such indemnity. If any doubt arises upon the validity of the title, the purchaser must either rescind the contract *in toto*, or consent to take such a title as the vendor is able to give him: (*Balmanno v. Lumley*, 1 Ves. & Bea. 225; *Paton v. Brebner*, 1 Bli. 66.)

Defect in quantity may be made matter of compensation.—When the defect is not in the title itself, but arises with respect to the term of tenure of the property, or the quantity of the land, the contract may still be enforced, the purchaser being allowed a proportionate reduction of the purchase money to make up the deficiency. In some instances the right to call for a completion of the contract is confined to the purchaser only; whilst, in others, the vendor will have equal rights with a purchaser in this respect; but in no case, it seems, will a vendor be allowed this privilege, where it may not also be claimed by a purchaser.

When purchaser may insist on specific performance with compensation, although vendor has no such right.—If a vendor contracts to sell an estate in fee simple, in which he has only a term of years (see 2 Bro. C. C. 497; *Drew v. Cork*, 9 Ves. 268; *Wright v. Howard*, 1 Sim. & Stu. 190), or a copyhold or customary estate (*Twining v. Morrice*, 2 Bro. C. C. 226; *Hick v. Phillips*, Pre. Chv. 575), or to dispose of an entirety, when in fact he can only confer a title to a proportionate part (*Attorney General v. Gower*, 1 Ves. 218; *Casamajor v. Strobe*, 3 Myl. & Kee. 726), or an underlease, where the contract was for the purchase of a lease, or a new lease where the contract was for the purchase of an existing lease (*Mason v. Corder*, *supra*), a purchaser may in every one of these instances compel a specific performance of the contract as far as the vendor is able to perform it, by taking the conveyance or assignment of such an interest as he really has a power to dispose of, and insisting upon having a proportionate sum by way of compensation allowed out of the purchase money to make up for the difference in value between the interest contracted for, and that which the vendor really had in the premises (*Dale v. Lister*, 16 Ves. 7, cited; *Hanbury v. Litchfield*, 2 Myl. & Kee. 629); nor can a vendor avoid complying with these terms, notwithstanding that he himself may have been deceived as to the true nature of the property; and

yet in no one of the above-mentioned instances can he call upon a purchaser to complete the contract upon similar terms. So, as we have already remarked, where an estate is subject to a right of entry for the purpose of working mines, the purchaser will be entitled to claim compensation; and thus a vendor will not be allowed to get clear of by offering to waive the contract, and to place the purchaser in the same situation as he would have been if such contract had never been entered into: (*Seaman v. Vaudrey*, 16 Ves. 323.)

Rule as to compensation general, but not universal.]—Lord Eldon has said, when alluding to a right of a purchaser to insist upon a specific performance with compensation, wherever vendor has not the interest he pretended to sell, that “generally, but not universally, a purchaser may take what he can get with compensation for what he cannot have:” (see 1 Ves. & Bea. 353; see also *Western v. Russell*, 3 ib. 187.)

Exceptions to the above-mentioned rule.]—The exceptions to the rule seem to be:—1. Where the right which the vendor is unable to confer is of such a nature that its actual pecuniary value cannot be arrived at—as, for instance, a right of sporting reserved over the property; for it would be impossible to estimate what difference in value such a reservation made, and such a right would break in too much upon the enjoyment and ownership of a purchaser to enable equity with propriety to compel him to take the estate with compensation (*Burnell v. Brown*, 1 Jac. & Walk. 168); and it appears to be doubtful whether compensation could be claimed in respect of the land lying dispersed, instead of being contained in a ring fence within which it was described to be (*Fewster v. Turner*, 6 Jur. 144), although it is perfectly clear such a misdescription would afford a purchaser ample ground for rescinding the contract.

2. Where it appears that at the time of entering into the contract the purchaser knew that the vendor could not execute the agreement, then, upon the principle laid down by Lord Redesdale in *Laurenson v. Butler* (1 Sch. & Lef. 13), that under such circumstances the agreement must be presumed to have been executed under a mistake, and therefore the purchaser will not be allowed to insist upon a specific performance as to the interest to which a vendor may be

actually entitled: (see also *Mortlock v. Butler*, 19 Ves. 292; *Harnet v. Yielding*, 2 Sch. & Lef. 549.)

3. A third exception to the above rule is where a person, who has only a partial interest, has contracted to sell the fee, and where compelling him to convey such an interest as he actually possesses in the premises might be prejudicial to the interests of other persons interested in the property, not parties to the contract. Thus, for example, where a tenant for life without impeachment of waste, with remainders over to other parties, contracts to sell the fee, a court of equity, on the grounds above-mentioned, has refused the purchaser specific performance with a compensation. So where a tenant for life without impeachment of waste, with a reversion in fee after an estate to his sons in tail male, with full knowledge of the nature of his title, entered into a contract for sale of the estate as owner with a purchaser who was at the time ignorant of the true state of the title; and afterwards the vendor endeavoured to withdraw from the contract, and the purchaser insisted upon a specific performance by the vendor's conveying such an estate as he could, with a compensation; the court observed, that without derogation in every respect from the jurisdiction, it was apparent that the courts would not in every case compel a vendor to convey such an estate as he could. And upon the general principle that the court will not execute that which is unreasonable, or would be prejudicial to persons interested in the property, but not parties to the contract, the court, before directing the partial execution of the contract by ordering the limited interest to be conveyed, ought to consider how that proceeding might affect the interests of those who were entitled to the estate subject to the limited interest of the vendor. The vendor had a life estate without impeachment of waste, with remainder to his sons in tail male; and having regard to the settlement, and the protection intended to be afforded to the objects of it—conceiving that the consequences of a partial execution of the contract might be prejudicial to those objects—seeing the difficulty of ascertaining, upon satisfactory grounds, the just abatement from the purchase money (for it was more easy to compute a just compensation where it is to be given for the defects in the quantity or quality of the land sold, than where it is to be given for the deficiency of the vendor's interest)—and considering also that nothing had been done upon the contract, so that the purchaser, though suffering the disappointment of not making himself the owner of an estate he desired to possess, had sustained no damage for which

compensation might not be given by a jury, it appeared to the court that a conveyance of the vendor's life estate and ultimate reversion to the purchaser ought not to be decreed: (*Thomas v. Dering*, 1 Kee. 729.)

4. The fourth exception is where a purchaser has been guilty of wilful misrepresentation, in which case he will not be allowed to insist upon a vendor's conferring such an interest as he can pass at a proportionate price. Hence, when upon a treaty for an exchange, C. informed T. that the tenants of the latter were agreeable to the exchange, and thereupon the agreement was made, which stipulated for possession on both sides; it appeared upon a bill filed, that the tenants had not consented; and the bill sought that T. should buy out his tenants, or that the value should be proportionately reduced. The opinion of the court being against the plaintiff, he offered to waive the part of the contract which stipulated for possession, and not to require the tenants to be bought out. But this was denied to him, because, as the contract was obtained by misrepresentation, it was void both at law and in equity; for that when an agreement is obtained by fraud, the effect is not to cut it down or modify it only, but to vitiate it *in toto*, and the party who has been drawn into it is totally absolved from obligation.

In what form compensation is usually allowed.]—When a purchaser is entitled to compensation, although it is usually allowed him in the shape of an abatement of a proportionate part of the purchase money, still it will sometimes be made to him in other ways; as where, upon the sale of woodlands, the value of the timber was correctly stated, but the land was represented to contain more by twenty-six acres than the actual quantity, he was allowed, as compensation, the estimated value of twenty-six acres of woodland, *minus* the wood: (*Hill v. Buckley*, 17 Ves. 394.)

2. *When a vendor may enforce a specific performance with compensation.*

The instances in which a vendor, when unable to perform his contract to the full extent, will be allowed to carry it out as far as he can, and making compensation to the purchaser between the property contracted for and that which he is enabled actually to convey, may be classed under the following heads:—1. To certain cases where the property has been misdescribed as to its extent. 2. Where the

vendor can only make a title to a portion of the property.
 3. Where he has not the interest or power of disposition over that which he pretended to sell.

1. *Where the property has been misdescribed as to extent.*]
 —Where the quantity of acreage has been unintentionally, or very slightly, misrepresented, a court of equity has considered it a proper subject for compensation, and has decreed a specific performance accordingly, as well at the suit of a vendor as of a purchaser. Where the difficulty has arisen in cases of this description is, when the description has been qualified by the terms "more or less," or, as "containing by estimation so many acres." In *Winch v. Winchester* (Ves. 375), those terms were held sufficient to cover a deficiency of five out of forty-one acres; but in another case, where the deficiency was as much as 100 out of 349 acres, those terms were considered insufficient: (*Portman v. Mill*, 2 Russ. 570.) And again, in *Gell v. Watson* (Sug. 372), similar expressions were not allowed to cover a deficiency of two acres in two closes stated to be (*according to a specified plan*) 8A. 4R. 4P. And it seems that the qualification will in no case protect a vendor who, aware of the exact quantity, makes a fraudulent misstatement, by exaggerating its extent: (*Duke of Norfolk v. Worthey*, 1 Camp. N. P. C. 337; *Portman v. Mills*, *suprà*; *Leslie v. Thompson*, 17 L. T. Rep. 277.)

2. *Where a vendor can only make a title to a portion of the property.*]
 —If a vendor is unable to make a good title to the whole of the property contracted for, he will, generally speaking, be entitled to claim specific performance as to such portion as he can confer a good title to, and making a proportionate deduction out of the purchase money for the remaining portion of the property. But if the portion to which no title can be made was the principal object of the purchase, a vendor would not be compelled to complete his contract relating to that part to which a title can be made, and which, without the residue of the property, would be of little or no service to him. In equity, the rule is that where an estate is sold in lots, and the vendor cannot make a title to the whole of the lots sold, if the lots are complicated together, so that the possession of each is essential to the enjoyment of the whole (*Dykes v. Blake*, 4 Bing. N. C. 463), the purchaser will be released from his contract; but otherwise he will be compelled to accept the lots to which a title can be made, with a compensation, *pro tanto*, for the rest: (*Poole v.*

Shergold, 2 Bro. C. C. 118; *Lewin v. Guest*, 1 Russ. 325.) The question is, "whether the part to which a title can be made is material to the possession and enjoyment of the rest of the estate: (*M^cQueen v. Farquar*, 11 Ves. 467.)

3. *Where he has not the interest he pretended to sell.*—We have already noticed that a vendor, who has contracted to sell a fee, cannot compel a purchaser to accept a term of years, or any other estate or interest he may possess in the property, or have the power of disposition over; but where the contract is for the sale of a term of years which the vendor has in the premises, although the vendor may not be entitled for the whole number of years mentioned in the contract, still, if the deficiency is not great, he will be entitled to a specific performance upon making a proportionate reduction in the amount of the purchase money. But if the term is considerably shorter than was contracted for, a court of equity would not only refuse its aid to a vendor, but would assist a purchaser to recover back any deposit he may have paid him: (*Long v. Fletcher*, 2 Eq. Cas. Abr. 5, pt. 4; *Hibbert v. Shee*, 1 Camp. N. P. C. 113.) Nor will a vendor be entitled to enforce specific performance where he has wilfully misrepresented the duration of interest, although such interest, from its very nature, must be an uncertain one; as in the case of property held upon a lease determinable upon lives, where a vendor represents the lives as being in health, when perfectly aware that such is not the fact: (*Breadley v. Collins*, You. 317; *Turner v. Harvey*, Jac. 169.)

VII. OF THE EVIDENCE A PURCHASER IS ENTITLED TO REQUIRE IN VERIFICATION OF THE ABSTRACT.

Rules of evidence adopted by conveyancers.—The rules of evidence that have been adopted by conveyancers in the investigation of titles differ materially from those laid down by courts of law, the latter requiring the best possible proof to be given, and in so minute a manner as to raise a conviction little short of actual observation of the fact to be established; whereas, conveyancers are, in most instances, satisfied to rely upon such proof as affords reasonable belief that the requisite evidence exists, and can be procured when wanted: (Cov. Ev. 3.) Hence, in a court of law, whenever a question relating to lands arises upon a will, the will itself must be produced; but conveyancers require no more than the production of the probate. A court of law

requires the testimony of the attesting witness to prove a deed, which conveyancers never insist upon, unless there is reason to doubt the genuineness of the witness's signature, and even then it would be incumbent on the purchaser to show reasonable grounds for doubting the truth of the attestation: (*Ib.*)

When conveyancers require stricter proof than is considered necessary in a court of law.—But if conveyancers relax the strict rules of evidence with respect to the proof and authenticity of documents, they require, in some instances, stricter proof of matters of fact than is considered necessary in courts of law. Hence, where a party has gone abroad, and has not been heard of for a period of seven years, the presumption of a court of law is that he is dead (Stat. 19, Car. 2, c. 6; *Hillary v. Waller*, 2 Ves. 261), yet a presumption of this kind is never admitted by conveyancers in matters of title; for to do this would be acting in direct opposition to the Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 17, which expressly secures the rights of persons beyond the seas.

As to the presumption of death without issue.—Courts of law have also gone much further with respect to the presumption of the death of parties without issue, or in presuming the failure of issue, than has ever been allowed by conveyancers. Thus, in the case of *Doe v. Griffin* (15 East, 293), proof by an elderly person that a member of her family went to the West Indies many years ago, and according to the repute of the family died there, and that she never heard of his being married, was considered by a court of law as *primâ facie* evidence that the party had died without lawful issue. But it is quite clear, that no conveyancer ought to rest satisfied with such slender evidence, nor could any purchaser be expected to accept a title from a remainder man or next heir in tail upon such a negative presumption of the determination of the prior estate.

Proof of the execution of deeds.—In the case of the proof of the execution and attestation of deeds, if such instruments have the names of the parties placed to the seals, and the names of the witnesses to the clauses of attestation, it will be treated as satisfactory proof that the signatures subscribed and indorsed are the genuine production of the parties whose names they import: (Cov. Ev. 11; *Talbot v. Hodson*, 7 Taunt, 251.) And where a deed has its seals

cut off, evidence may be given that it was originally sealed : (*Bolton v. The Bishop of Carlisle*, 2 H. Bl. 259.)

Proof of the execution of powers.] — Where the terms of a power of appointment require that it shall be executed in the presence of a certain number of witnesses, if the deed of appointment appears to have been executed accordingly, no further evidence is usually called for in order to prove that the donee duly complied with the terms of the power ; neither, where such appointment is directed to be made in the presence of credible witnesses, is it the practice to require any evidence of their credibility : (Cov. Ev. 22.)

Instruments themselves must be produced.] — The instruments themselves must be produced, if in existence ; but if lost or destroyed, then, if the vendor can deliver over copies which would be evidence at law, and prove that the originals were duly executed and delivered, it will be a sufficient verification of the abstract ; but unless a vendor can prove both the latter facts, he will be unable to show a good title, and the purchaser may annul the contract : (*Bryant v. Bush*, 4 Russ. 4) Every vendor is necessarily bound to furnish the purchaser with the means of asserting his title and defending his possession. The title deeds are the ordinary and primary means for that purpose. If the primary means do not exist, there may be secondary means to the same end. Assuming the abstracts duly and fully prove the contents of the deed, it yet remains to be proved that the deeds were duly executed and delivered ; and the vendor must furnish the purchaser with such proof ; and unless such proof can be furnished, the purchaser is entitled to be discharged : (*Southby v. Hutt*, 2 Myl. & Cr. 207 ; *Doe v. Brydges*, 2 Sco. N. R. 339.)

Power of attorney must be produced when instrument has been executed by.] — Whenever a deed has been executed by attorney, the power of attorney must be produced, and proof also must be given that the principal was living at the time such power was executed.

Examined copies of enrolled deeds how far evidence.] — Where deeds are by law required to be enrolled, examined copies are sufficient evidence of the originals ; but where enrolment is not compulsory, a copy is evidence against the parties on whose acknowledgment the enrolment

was made and their representatives, and the non-production of the deed must be accounted for in the same way as if no such enrolment had taken place; but with an exception so far as lands holden under the Duchy of Cornwall are concerned, as the statute 7 & 8 Vict. c. 65, enacts that the enrolment, or an examined copy of any deed executed under the provisions of the acts relating to the Duchy of Cornwall, shall be sufficient proof of the contents and due execution of the original, although its non-production is not accounted for: (sect. 34.)

Copies of memorial of registered deed, how far evidence.]—An examined copy of the memorial of a deed registered in a register court is secondary evidence of the deed as against the parties to it and persons claiming under them (*Wollaston v. Hakewell*, 3 Man. & Gr. 267); but not, it seems, as against strangers: (*Doe v. Clifford*, *sup.*; *Collins v. Maule*, 8 Car. & P. 502.)

Where deeds have been destroyed, parties may be made to concur in subsequent conveyances.]—Where deeds which have been recently executed have been destroyed by fire, or other accident, and the parties are still living, the evil may be in great measure remedied by the parties to such deed concurring in the conveyance to the intended purchaser; and this a vendor who was a party to the destroyed deed may be compelled to do, or to execute a new conveyance to the party claiming under it, in case the latter still continues to retain possession of the property: (*Bennett v. Ingoldsby*, Finch. 262.)

Recitals, how far evidence.]—The recital of a deed is evidence of its existence operating by way of estoppel as against all parties executing the deed containing the recital, and those claiming under them, but is no evidence of its contents or effect, beyond what its name and nature necessarily imply, unless proof be given of its loss or destruction.

Loss of mesne assignments may be made good by recitals.]—In the case of leaseholds, the loss of deeds of mesne assignments may be made good by the recitals of them; and in any renewed ecclesiastical lease granted since the 21st June, 1836 (unless in pursuance of a covenant or agreement entered into before the 1st of March, 1836), the recital

of the old lease, and of the death, &c., of the *cestuis que vie*, is conclusive evidence thereof: (6 Will. 4, c. 21, s. 2.)

Bargain and sale for a year proved by recital.—The recital of the bargain and sale, or lease, for a lease to accompany a release, when contained in any conveyance executed before the 15th of May, 1841, is sufficient evidence of the proof of the execution of the former instrument without proof of its loss by the statute 4 & 5 Vict. c. 21, s. 2, which statute dispenses altogether with the necessity of any lease for a year, by rendering a release as effectual for the conveyance of freehold estates as a lease and release by the same parties.

Registration.—Where deeds or other documents are required to be registered, the signature of the deputy registrar to the memorandum indorsed on the instrument is the proper evidence that it has been duly registered.

As to copyholds.—Copyhold assurances are proved by the copies of court roll under the hands of the steward; but it is not the usual practice with conveyancers to require proof of such handwriting, if the documents come from the proper custody, and there are no special grounds for suspicion. If the copies originally delivered to the copyholder are lost, the purchaser has a right to call upon the vendor, at his own expense, to verify the abstract by the production of authenticated or examined copies, and this notwithstanding the steward is ready to permit the purchaser to inspect the court rolls: (Scriv. Cop. 493.) Copies authenticated by the steward are evidence, although they are not copies originally delivered to the tenant (*Breeze v. Hawker*, 14 Sim. 350); as are also mere examined copies: (*Doe v. Freeman*, 12 Mees. & Wels. 844.) If any surrenders have been made by attorney, the power of attorney must be produced, and proof given that the principal was alive at the time the power was acted on, in the same manner as when a conveyance of freehold property has been made by attorney.

Fines.—The indentures of fine which accompany the deeds are usually treated as true and legitimate copies of the record, and if the proclamations are indorsed, it is presumed that they were made pursuant to the statute; so that where the possession has gone according to the fine, the conveyancer rests satisfied with the indorsement without requiring the proclamations to be further verified; but if no proclamations

are indorsed on the indentures, and the safety of the title hinges in any way upon non-claim, the practice has been for the purchaser to call for such a certificate at the vendor's expense. But this course of proceeding is now rendered unnecessary by the statute 11 & 12 Vict. c. 97, which supplies the want of proclamations with respect to fines levied at Westminster (Sch. 1 and 3), and the statute 5 & 6 Vict. c. 32, contains provisions for giving, in certain specified cases, validity to fines and recoveries levied and suffered in the now abolished Courts of Great Sessions in Wales and of the Session of Chester.

Fines made valid without amendment.—By the Fine and Recovery Substitution Act (3 & 4 Will. 4, c. 74), if it shall be apparent from the deed declaring the uses of any fine, then or thereafter to be levied, and there is in the indentures, record, or any of the proceedings, any error in the name of the conusor or conusee of such fine, or any misdescription or omission of lands intended to have been passed by such fine, then the fine, without any amendment of the indenture, record, or proceedings in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the same would have been if there had been no such error, misdescription, or omission: (sect. 7.)

Recoveries.—The exemplification is the proper evidence of a recovery; but if this be either lost or mislaid, an extract from the King's Silver Office will be sufficient. By the statute Geo. 2, c. 20, a recovery deed after twenty years is made evidence of the recovery; and by the Fine and Recovery Substitution Act (3 & 4 Will. 4, c. 74), whenever it shall be apparent from the deed making the tenant to the writ of entry for suffering a common recovery, there is in the exemplification, record, or any of the proceedings of such recovery any error in the name of the tenant, demandant, or vouchee in such recovery, or any misdescription or omission of lands intended to have been passed by such recovery, then the recovery, without any amendment of the exemplification, record, or proceedings in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the same would have been if there had been no such error, misdescription, or omission: (sect. 8.) Recoveries are also rendered valid where the deed of conveyance making the tenant to the præcipe was by bargain and sale that was not duly enrolled, where such recoveries would have been valid in other respects: (sect. 10.) As are also

recoveries that were invalid in consequence of there not being proper tenants to the writ of entry in certain cases; as where any person in whom an estate at law was outstanding had omitted to make a tenant to the writ of entry, but who was the owner, or had the power to dispose of not less than an estate for life or lives in the whole of the rents and profits of the lands in which such estate at law was outstanding, or the ultimate surplus of such rents and profits after payment of any charges thereout, and whether any surplus after payment of such charges shall actually remain or not, shall, within the time limited for making the tenant to the writ for suffering such recovery, have conveyed such estate in possession to the tenant to such writ: (sect. 11.)

Proceedings in courts of law and equity.—Proceedings in courts of law and equity are proved either by exemplifications under the seal of the courts, or authenticated by the signature of the judges in cases where the court has no seal (*Alves v. Banbury*, 4 Camp. N. P. C. 28); and proof of such seal and signature is now rendered unnecessary by the statute 8 & 9 Vict. c. 113.

Certified copies of records.—The records of the Courts of Chancery, Exchequer, Queen's Bench, and Common Pleas, and of the abolished courts in Wales, Chester, Durham, and Isle of Ely, are by the statute 1 & 2 Vict. c. 94, committed to the custody of the Master of the Rolls; and certified copies of such records, under the seal of the Record Office, are made evidence equally with the originals: (ss. 12, 13.)

Office copies.—Copies made by an officer of a court under its authority have always been received as satisfactory evidence by conveyancers, although, strictly speaking, they are only evidence in the causes or matters to which they belong.

As to proceedings in bankruptcy or insolvency.—Proceedings either in bankruptcy or insolvency are proved by copies certified in manner directed by the several Bankrupt and Insolvent Acts; but proof of the seals and signatures are rendered unnecessary by the statute 8 & 9 Vict. c. 113. But if the fiat, petition, adjudication, and certificate of appointment of assignees has not been enrolled, the purchaser may call upon the vendor to cause the same to be entered on record at his own expense, unless the bankrupt will either

consent to join in the conveyance to the purchaser, or it has become too late to invalidate any of the proceedings in bankruptcy on account of any of the above-mentioned omissions, although it has been doubted whether even the bankrupt's concurrence, or inability to upset the proceedings, will affect the purchaser's right to have the proceedings entered on record (1 Sug. Vend. 627) ; but see 1 Jarm. 97 (Sweet's edit.) As to how vendor should protect himself from being required to have the proceedings entered on record, see *ante*, p. 46.

Grants from the Crown.—Grants from the Crown are proved by an exemplification or certified copy ; but where the original happens to be lost, if the vendor's solicitor can find out and inform the purchaser where the grant is enrolled, and such information turns out to be correct, it will be all the purchaser is entitled to require ; and he must examine the enrolment at his own expense, and has no right to call upon the vendor to be at the costs of supplying him with a copy.

Acts of Parliament.—A private act of Parliament, when printed by the Queen's printers, is sufficiently proved by the printed copy, and the statute 8 & 9 Vict. c. 113, s. 3, renders it unnecessary to prove that the copy purporting to be, was in fact so printed ; neither was such proof previously considered necessary with respect to private acts of Parliament, which contained the usual clause making the printed copies evidence. One of these printed copies should be forwarded to the purchaser with the abstract.

Awards under inclosure acts.—The awards under inclosure acts are proved by a copy or extract, signed by the proper officer of the court, if the enrolment has been made in one of the courts at Westminster, or by the clerk of the peace for the county or his deputy, if the enrolment has been made with the clerk of the peace : (41 Geo. 3, c. 109, s. 5 ; 3 & 4 Will. 4, c. 87, s. 2.) A copy of such award or extract should accompany the abstract.

Shares in public companies.—Copies of the registry of the assignment of shares in public companies are usually made evidence of such assignment by the local acts by which such companies are constituted : (*Bristol Canal Company v. Amos*, 1 Mau. & Selw. 696.)

Executorship.—An office extract of the will by which the executors were appointed, or the probate of the will, affords the most satisfactory proof of the executorship.

Intestacy.—To prove intestacy as to personal estate, letters of administration should be produced; and to prove intestacy as to real property, letters of administration, or the probate of a will not affecting the lands in question, or putting the heir to his election to abide by the dispositions of the will, or to renounce all benefit under it.

Births, marriages, baptisms, deaths, and burials.—These facts are proved by certificates of extracts from the parochial and general registers, and by declarations of the identity of the parties. Although a certified extract from a parochial register is evidence of the fact of a birth or a death, it affords no proof of the time when either of those events occurred; but it affords evidence as well of the time, as of the fact of marriage: (*Doe v. Barnes*, 1 Mood. & Rob. 386.) By the General Register Act, 6 & 7 Will. 4, c. 86, amended by statute 1 Vict. c. 22, the fact of the birth or the death, and not of the baptism or burial is made the subject matter of registration, and the entries in the register are made accordingly, so that certificates of such entries are to be received as evidence of the time of the birth or death to which they relate: (sect. 38.) Still, it seems that a purchaser, where the proof of a party's death is material to the title, may insist upon being supplied with a certificate of burial extracted from the parish register, and cannot be compelled to rest satisfied with a certificate of that fact from a district registrar: (*Tomlins v. Tomlins*, 8 Jur. 211.) But as even certificates of the above facts cannot always be obtained, evidence of a less satisfactory character must sometimes be necessarily resorted to; hence the traditionary declarations of deceased members of a family have generally been received as evidence, *after the death of those persons*, in proof both of the occurrence and time of any of the above mentioned events: (*Higham v. Ridgeway*, 10 East, 120); and conveyancers are in the habit of receiving statutory declarations under the act 6 Will. 4, in proof of any of the above facts, as well as of the identity of the parties, notwithstanding such evidence will not be admitted in any courts, either of law or equity, during the lifetime of the declarant, although admissible after his decease (*Pendril v. Pendril*, 2 Str. 294; *Doe v. Ridgeway*, 4 B. & A. 53); and where such declarations cannot be obtained from members of the family, they may

be received from other persons who are capable of deposing to the facts, which intimate friends, inmates of the family, or even domestic servants may often be better acquainted with than relations, where they reside at a distance, or are in the habit of holding little intercourse with each other. But before a purchaser's solicitor consents to receive this secondary kind of evidence, he should require proof that diligent but fruitless search has been made in the parochial and other registers; and it should also appear upon the face of the statutory declaration, how, and in what manner the deponent is likely to be well acquainted with the facts deposed to, as well as reasonable grounds for his or her belief: (*Randolph v. Gordon*, 5 Pri. 316.)

Probate of will and letters of administration, how far evidence of death.—Probate of a will, or the grant of letters of administration to the effects of a party alleged to be dead, is treated by conveyancers as sufficient proof of the death; and whenever it appears that such probate or administration has been acted on, a purchaser will have no right to insist upon being supplied with a certificate either of the death or burial of the testator or intestate.

Proof of the death of seamen.—The books kept at the "Sick and Hurt Office," containing the copies of the returns of persons dying on board Her Majesty's ships, are evidence of the death of seamen: (*Wallis v. Cook*, 5 Esp. 116.)

Proof of the death of soldiers.—The deaths of soldiers and privates in Her Majesty's regular service may be ascertained by reference to the books of the commanding officer of the regiment to which they belonged; but it does not appear that any return is made and kept of the deaths, or of the names of the particular individuals who happen to die in the service.

Proof of death of a party without issue.—This fact, which can only be supported by negative proof, may be established by a statutory declaration made either by relations, or other persons well acquainted with the party, in the same manner as births, deaths, marriages, and other matters of fact we have already considered; or such proof may arise out of facts or circumstances irreconcilable with, or opposed to the hypothesis that there are any legitimate descendants of the supposed ancestor; such as proof that the party was

never married (*Hemming v. Spiers*, 15 Sim. 550); the non-mention of issue in wills, or any other documents in which issue, if existing, would naturally be noticed, and the descent of property, or of titles of dignity upon the assumption of want of issue.

Legitimacy.—The presumption, *prima facie*, is that a child born in wedlock is legitimate; hence a certificate of the marriage of the parents, and proof of the birth of the child during the lifetime of the father, or within the period allowed for gestation after his decease (Co. Litt. 244 a; *Parish of St. George v. St. Margaret*, 1 Salk. 123; *The Queen v. Inhabitants of Mansfield*, 1 Ad. & El. (N. S.) 444), will be considered as satisfactory evidence of that fact, where no question or dispute appears ever to have arisen upon the subject.

Proof of redemption of land tax.—When the property is contracted to be sold discharged from the land tax, the redemption must be shown by the certificate of the commissioners, the receipt of the cashier of the Bank of England, and memorandum of registration.

Annuities and rent charges.—The last receipt from the party entitled to payment of the annuity or rent charge acknowledging such payment, affords satisfactory proof that all arrears have been duly paid up to that, the period mentioned.

Seisin and identity of parcels.—Land tax and poor rate assessments (*Smith v. Cartwright*, Car. & P. 218; see also, *Harrison v. Blades*, 3 Camp. N. P. C. 457), are usually received as evidence of seisin and identity of parcels, as are also the receipts of rent, old leases, or counterparts of leases, also maps, terriers, and plans of the property. These facts may also be shown by the evidence of parties well acquainted with the property, as of present or former occupiers; and even the declarations of a deceased occupier, as to the person of whom he held the premises, have been holden sufficient evidence of that fact, such declarations being considered as made against his own interest, upon the recognised principle that the possession of every occupier is, *prima facie*, taken to be a seisin in fee, the identity of the lands being of course proved: (*Peaceable ex dem. Uncle v. Watson*, 4 Taunt. 16.)

Modern practice, where seisin is to be proved by evidence of parties acquainted with the property.—Where it is necessary to prove the identity of parcels or seisin through the medium of persons acquainted with the property, the practice until recently was to require the facts so stated to be proved by affidavit; but now a declaration in pursuance of the statute 6 Will. 4, for the suppression of extra-judicial oaths is substituted.

How seisin is shown where the title is derived through an heir.—Where the title is derived through an heir, it will be necessary to ascertain that he was seised of the property, either actually or constructively. An actual entry for the purpose of vesting such seisin may be made either by the heir in person, or by some other party in his behalf, as his guardian for instance; and even an entry by a stranger on behalf of an infant heir has been viewed in the same light as an entry by a guardian for that purpose. A constructive acquisition may be inferred where a person can be shown to have exercised acts of ownership over the property, as by receiving the rents and profits (*Davies v. Lowndes*, 7 Scott, 22); and even a continued possession by the tenant of the ancestor under a lease, by statute or by elegit, will supply sufficient evidence of seisin in the heir, without any actual receipt of the rent, or entry by him on the premises: (Co. Litt. 15 a.; *Newman v. Newman*, 3 Wils. 528; *Bushby v. Dixon*, 5 Dow. & Ry. 126.)

As to incorporeal hereditaments.—With respect to incorporeal hereditaments, such as rents, titles, and advowsons, as there can be no actual entry made upon any of the above kinds of property, the proof of seisin must be evidenced by showing acts of ownership, such as receiving the rents, or tithes, or making presentations to the advowson: (Com. Dig. tit. Seisin C.)

Wills.—The probate of a copy of a will, we have already noticed, is all that a conveyancer requires, a custom which has grown into such general use, that a purchaser would not, it seems, be allowed to resist a specific performance on the ground of a vendor's refusal to produce the original will; neither can a purchaser insist on verifying the abstract with the original will at the vendor's expense, if the probate is ready for his inspection.

Probate best evidence with respect to personalty.—With respect to leasehold property and personal estate, the

probate is the best evidence even, in courts of law. If therefore the probate copy of the will appears to be duly executed, it will be considered to afford sufficient proof that the attestations are genuine: (Cov. Ev. 2, 93.) But it must be ascertained, in all cases where the will was prior to the operation of the act 1 Vict. c. 26, that it was made in conformity to the Statute of Frauds, 29 Car. 2; c. 3; and when made and published subsequently to the act of Victoria, that it was made in conformity to provisions of that act: (see 2 Hughes Con. Prec. 413, 418, 1st edition.) If the probate is lost, an official copy will afford evidence equally satisfactory to a conveyancer, as the probate, or even the original will.

VIII. OF THE COMPARISON OF THE DOCUMENTS OF TITLE WITH THE ABSTRACT.

How the deeds, &c. should be compared with the abstract.]—The comparison of the title deeds and other documents of title with the abstract is a very important duty, and requires the strictest scrutiny; for if done in a cursory or careless manner, the most serious consequences may ensue from it; as upon close investigation it is often discovered that an important clause in an instrument has been omitted, or else abstracted in so loose a way as to convey a very different signification from what the terms used in the abstracted document would really imply.

Propriety of making comparison previously to submitting abstract to counsel.]—Properly speaking, whenever an abstract is submitted to counsel, the title deeds and other documents should be previously compared with the abstract. By adopting this course considerable time as well as expense will often be saved in the end. It not unfrequently occurs that when the comparison of the various documents comes to be made with the abstract, some discrepancy is found between them, which often renders a second opinion of counsel necessary; thus increasing the costs, and adding to those vexatious delays which are too often incidental to the completion of a purchase. Another great advantage to be derived from a previous comparison of the documents with the abstracts, is, that it enables the purchaser's solicitor by short marginal remarks to draw the attention of counsel to many clauses, facts, and circumstances that are not sufficiently disclosed by the

abstract, but which at the same time are often important to the title. Still, notwithstanding the advantages to be derived from this course of proceeding, it is not the one that has been usually adopted by the profession, and some eminent writers on conveyancing have gone so far as to approve of the practice of deferring this examination until after the abstract has been perused by counsel, even in those cases where access to the various documents could be readily had in the first instance.

Vendor bound to produce all documents in verification of the abstract.—The vendor, in the absence of an express stipulation to the contrary, is bound to produce all documents set out in the abstract, whether in his possession or otherwise, without any reference as to whether the purchaser is or is not to be entitled to have them delivered up to him on the completion of the purchase: (*Relingall v. Lloyd*, 2 Nev. & Man. 410; *Jermain v. Eggleston*, 172.) Still this relates only to documents of such a nature as are usually handed over to a purchaser, and does not include records, such as fines and recoveries, or wills of real estate; for in the latter case office extracts, probates, and copies are all a purchaser is entitled to call for.

Expenses of production, and of journeys thereby rendered necessary, must be borne by vendor.—The expenses of the production of all deeds and other documents of title which are not in the vendor's possession, as also of attested copies, as also of journeys for the purpose of examining and comparing them with the abstract, and all incidental costs connected therewith, must, in the absence of an express stipulation to the contrary, be borne by the vendor: (*Boughton v. Jewell*, 15 Ves. 176; and see also *Dare v. Tucker*, 6 ib. 460.) But this will not, generally speaking, comprehend attested copies of instruments of record. Still, there are some cases in which, it seems, a vendor will be required to supply attested copies even of instruments of record; for where he has not the instrument itself, and is unable to procure it, he is bound to obtain an attested copy of it to enable the purchaser to compare it with the abstract, and on the sale being perfected, the purchaser will be entitled to have it handed over to him with the other documents, unless indeed the vendor happens to retain other estates holden under the same title.

In what instances vendor is not bound to defray expenses

of journeys, &c. for the purpose of comparing documents with abstract.—But a vendor is not bound to defray the expenses of any journeys unnecessarily incurred by a purchaser's solicitor in comparing the documents of title with the abstract. If, therefore, the title deeds are in London, then, according to the established rules of practice, a country solicitor should instruct his London agent to inspect the deeds there, and he will not be permitted to charge the costs of his journey to London for that purpose: (*Alsop v. Lord Oxford*, 1 Myl. & Kee. 564.) But it will be otherwise where the documents of title are in the hands of persons residing in different parts of the kingdom, for in the latter case the purchaser's solicitor will be entitled to charge the vendor for all journeys necessary for comparing them with the abstract, and will not be obliged to employ an agent in a country town where the documents may chance to be to perform that duty in order to save those expenses: (*Rawlings v. Vincent*, Carth. 124; *Hughes v. Wynne*, 8 Sim. 85.)

Best mode of comparing documents with abstract.—To make the comparison properly, two persons must be employed, one of whom at least should be perfectly conversant with the effect and operation of all legal documents connected with real property. In fact this duty ought always to be performed by principals, and not, as too often occurs, intrusted to clerks only; but any one who can read correctly will do for an assistant. The latter should read over the document distinctly, clause by clause, whilst the examiner should have his eye and attention fixed on the corresponding clause in the abstract, and if he discovers any discrepancy between them, he should make a note of it in the margin, taking care at the same time to point out exactly in what that discrepancy consists.

It must be ascertained that every abstract is properly executed and attested, &c.—As he finishes the comparison of each separate document, the examiner must see that every one who is named as a conveying party to a deed has placed his hand and seal thereto, and that each execution has been duly attested. And whenever it is necessary that any receipt for the consideration money should be indorsed, he must also see that such receipt clause is indorsed accordingly, and also duly signed and witnessed: (*Kennedy v. Green*, 3 Myl. & Kee. 699.) So if the terms of a power require that an appointment should be executed in the presence of

a specified number of witnesses, or in any other particular manner, it must be seen that the terms of the power have been properly complied with; and where registration is necessary he must ascertain that the instrument has been registered accordingly.

Purchaser has no right to call for proof of execution.—A purchaser has no right to call upon a vendor to prove the execution of the various documents set out in the abstract: (*Thompson v. Miles*, 1 Esp. N. P. C. 184; *Crosby v. Percy*, 1 Camp. N. P. C. 303.)

As to documents requiring enrolment.—If the instrument requires enrolment, it will be necessary to see, not only that it has been enrolled, but also that this has been done within the proper time. With respect to most assurances requiring enrolment, it is expressly prescribed that, unless this be done within some specified time, they are declared to be inoperative, as occurs in the case of a deed or bargain and sale, or disentailing assurance, unless enrolled within six calendar months after execution: (27 Hen. 8, c. 16; 3 & 4 Will. 4, c. 74, s. 41.) As to a deed of bargain and sale it must be observed that the time presented for enrolment was six *lunar* months from the time of the delivery of the deed (2 Inst. 673; Hob. 140; Shep. Touch. 223), which period has been enlarged with respect to enrolments in Chancery to six calendar months: (3 & 4 Will. 4, c. 74.)

Acknowledgments of married women.—Where the acknowledgment of any married woman is stated to have been taken, it must be ascertained not only that such a memorandum of acknowledgment is indorsed on the deed, and that the acknowledgment has been made, but also that it has been taken before the proper commissioners; for the commissioners appointed by the statute have no power to act beyond the local limits of their respective districts, so that an acknowledgment taken before them elsewhere would be totally inoperative. It must also be shown that the acknowledging parties were of full age at the time of acknowledgment; for a minor, although a married woman, is as incapable of acknowledging a deed as she would be, if single, of making a valid conveyance of her property.

It should be ascertained that instruments are properly stamped.—It must be ascertained that every deed or other

document requiring a stamp is impressed with a stamp or stamps bearing the necessary stamp duties. It does not, however, appear to be the practice to count the number of folios in the various documents, to see whether or not they are charged with the proper amount of progressive duties,—a troublesome and tedious task certainly, yet not altogether an unimportant one.

Propriety of noting amount of stamp duties in margin.—If the amount of stamp duties has not been already noted in the margin of the abstract, the purchaser's solicitor should do so when he compares it with the documents, as he may find it useful to be able to refer to afterwards, or to assist, in case it should afterwards be thought advisable to take the opinion of counsel as to any doubt or question that may arise with respect to the instruments being properly stamped or otherwise, which often becomes an important matter of inquiry to determine, and requires very often a minute knowledge of the stamp laws.

When necessary to call for the production of leases, &c.—It will also be necessary, not only to call for all leases, counterparts, and agreements relating to the property, but also, whenever the property is in the occupation of a tenant, to inquire into the nature of his tenancy; for if a purchaser should neglect to do this, he will be considered to have implied notice of that title—notice of a tenancy being construed as implied notice of the terms upon which the premises are holden: (*Taylor v. Stibbert*, 2 Ves. 440; *Daniells v. Davidson*, 16 *ib.* 249; *Douglas v. Whiting*, *ib.* 524; *Taylor v. Baker*, Dan. 71.)

Costs for examination and comparison of documents.—The charges made for examining and comparing the abstract with the documents of title are made either by the hour or the day. If made by the hour, the charge is 6s. 8d. per hour. If by the day, two guineas per diem; and 3s. 4d. per hour is allowed for the clerk attending and assisting in the examination: (Gilb. Costs, 354.)

Purchaser's solicitor, if he finds any discrepancy between documents and abstract, or any other defect of title, should give early notice to vendor's solicitor.—If upon the examination and comparison of the documents of title with the abstract any discrepancy appears between them, or any thing should arise which causes the purchaser's solicitor to

disapprove of the title, he should give immediate notice of the same to the vendor's solicitor, and forwarding at the same time his objections or requisitions; for notwithstanding a purchaser's solicitor may approve of the title as it appears to him on the face of the abstract, this will not in any way restrict him from showing any other evidence that the title is a bad one: (see Alderson, B.'s remarks on *Attorney-General v. Sitwell*, 1 You. & Coll. 571.) And even where, by the express terms of the contract, the vendor is not to be called upon to carry back his title to beyond a certain stated period, this will not prevent the purchaser from showing, that for some cause or defect anterior to such period, the vendor is unable to confer a marketable title: (*Shepherd v. Keatley*, 1 C. M. & R. 117; S. C., Tyrw. 571.)

Purchaser should not deal with the estate as owner, until assured of the validity of the title.—A purchaser should be careful not in any way to deal with the estate as the owner thereof, until, by the comparison of the title deeds and other documents with the abstract, he has ascertained that a marketable title can be made to the property. The circumstance of the abstract being so prepared as to deceive a purchaser into the belief that the title is unimpeachable will not, unless actual fraud can be shown, be sufficient to render the vendor responsible; because the purchaser, by exercising proper caution, might have discovered that the abstract did not tally with the documents expressed to be set forth in it. Hence, if a good title appears on the face of the abstract, and the purchaser enters into a subcontract with a subpurchaser, and upon an inspection of the deeds the title turns out to be bad, and he has to pay the subpurchaser the costs of investigating the title, he cannot come upon the vendor for the repayment of them: (*Walker v. Moore*, 10 B. & C. 416.)

IX. WHAT ACTS WILL AMOUNT TO A WAIVER OF THE OBJECTIONS OR REQUISITIONS TO A TITLE.

Precautions to be taken by a purchaser taking objections.—A purchaser who intends to avail himself of any objections he may take, or any requisitions he may make for perfecting the title, must be careful not to do any acts that may be construed as a waiver of either of those rights; consequently, as we have remarked in the preceding section, although a vendor cannot be compelled to accept a lease-

hold estate, or copyhold or customary estates, where he has contracted for the sale of a freehold interest, still, if, after taking his objection to the tenure, he still goes on with the treaty, he will be considered to have waived his objection, and be compelled to take the property upon having reasonable compensation allowed him out of the purchase-money: (*Fordyce v. Ford*, 4 Bro. C. C. 494; *Calcraft v. Roebuck*, 1 Ves. 221; *Burnell v. Brown*, 1 Jac. & Walk. 168.)

Taking possession, whether a waiver of objections.—Whether taking possession of the property will or will not be construed as a waiver of objections to the title, depends in a great measure upon the mode by which such possession is acquired. If a purchaser enters without the consent or approval of the vendor (*Calcraft v. Roebuck*, 1 Ves. 221), and in the absence of any arrangement to that effect in the terms of the contract, he will by those acts be considered to have approved of the title; but, generally speaking, where possession is taken in pursuance of the terms of the contract (*Stevens v. Guppy*, 3 Russ. 171), or by the approval of the vendor (*Burroughs v. Oakley*, 3 Sim. 59), it will not hinder a purchaser from insisting upon having a good title, and any requisition he may have made to that effect duly complied with (*Simpson v. Sadd*, 2 Week. Rep. 518); still, even although possession thus acquired will not of itself amount to a waiver of objections or requisitions, a purchaser, after he is so in possession, may do such acts as will be considered as an approval of the title, and thus deprive himself of all right to have such objections removed, or requisitions complied with; for where a purchaser, after an abstract had been delivered to him, which disclosed the reservation of a right of sporting, which had not been mentioned in the conditions of sale (and which, as we have already seen (*ante*, p. 26), would have afforded a purchaser ample grounds for rescinding the contract *in toto*), entered into the possession of the property, and paid part of the purchase money without objecting to the reserved right, but which he afterwards raised as an objection to completing the purchase, he was nevertheless considered to be bound by his conduct, which was considered a waiver of the objection, and he was held to his bargain without any compensation whatever: (*Burnell v. Brown*, 1 Jac. & Walk. 168.) So, where a purchaser took possession under a contract, paid part, and gave security for the rest of the purchase money, and mortgaged his interest under the contract, it was held that the acts amounted to

an admission of the approval of the title : (*Haydon v. Ball*, 1 Beav. 337.) So, where a party under an agreement for a lease entered into possession without having previously called upon the lessor to show a title, and approved of a draught lease furnished by the lessor, he was held by these acts to have waived all objections to the title : (*Warren v. Richardson*, 1 You. 1 ; see also *Clive v. Beaumont*, De Gex & S. 397 ; *Smith v. Capron*, 7 Hare, 191.)

How purchaser should guard against taking possession being construed an acceptance of the title.—A purchaser, therefore, should never enter into possession of the property before he has approved of the title, without a memorandum, under the hands of the vendor, that such possession shall not be considered as a waiver of any objections or requisitions he may have to make with respect to the title, or made a ground for calling upon him for payment of the purchase money before the title is perfected, and a conveyance executed in pursuance of the terms of the contract. At the same time, it is usual for the purchaser, if no previous agreement has been entered into to that effect, to undertake to pay interest on the purchase money up to the time of the completion of the contract.

Counsel's approval of title how far waiver of objections, &c.—As a purchaser is not bound by his counsel's approval of the title (*Deverell v. Lord Bolton*, 18 Ves. 505), such approval will not be treated as a waiver of objections or requisitions by the purchaser, unless he adopts the opinion and deals with the vendor in accordance with it ; but if he does so, he will be considered as having approved of the title : (*Alexander v. Crosby*, 1 Jones & Lat. 666.)

X. OF THE SEARCH AND INQUIRY FOR INCUMBRANCES.

Purchaser's solicitor must ascertain whether there are any incumbrances.—If the purchaser's solicitor is satisfied with the title as it appears from the abstract and the documents therein referred to, his next course of proceeding is to discover whether or not there are any incumbrances affecting the property, which neither the abstract or documents of title disclose. These it will be his duty to search for ; but previously to so doing, he should ask the vendor's solicitor if there are any such incumbrances, which usually, and indeed ought always to, form one of the questions inserted by a purchaser's solicitor in the requisitions on title. In some of

the western parts of England, a practice has sprung up of requiring a vendor to make a declaration that there are no incumbrances on the property, and it would certainly afford a beneficial protection to purchasers if this practice became universal.

(See a form of this kind, 2 Hughes Pract. Sales, No. XLVI., p. cxxxix., 2nd edit.)

Vendor's solicitor, denying there are incumbrances, renders himself personally liable should any such exist.—If a vendor's solicitor, in reply to the question put to him by the solicitor of the purchaser, denies that there are any incumbrances, or wilfully conceals them, he will render himself personally liable to the purchaser: (*Arnot v. Briscoe*, 1 Ves. sen. 951; *Evans v. Bicknell*, 6 ib. 193; *Richards v. Barton*, 6 Esp. N. P. C. 268; *Burrows v. Lock*, 10 Ves. 470.)

Inquiries should be made of persons supposed to have claims upon the property.—Whenever a purchaser suspects that any person has a claim upon the property which forms the subject-matter of contract, such person should be asked by the purchaser, or his solicitor, whether such is or is not the fact, stating at the same time that the latter intends to purchase the property. By taking this precaution, if the person really has an incumbrance, but denies it, equity would not afterwards permit him to enforce it as against the purchaser: (*Ibbotson v. Rhodes*, 2 Vern. 554; *Amy's case*, 2 Ch. Cas. 128, cited.)

Inquiries as to incumbrances should be made of trustees by purchasers of trust property.—Whenever a purchaser contracts to buy an equitable estate or interest, he should ask the trustees whether the property is subject to any incumbrances, when, if the latter were to make a false representation, equity would compel them to make good any loss which the purchaser might sustain in consequence of such fraudulent statement: (*Burrows v. Lock*, 10 Ves. 470.)

Vendor bound to discharge all incumbrances.—The vendor is bound to discharge all incumbrances before he has any right to call upon the purchaser to accept a conveyance and pay the purchase money (*Anon.* 2 Freem. 106; *Vane v. Lord Barnard*, Gilb. Eq. Rep. 6; *Serjeant Maynard's case*, 2 Freem. 1); and if the incumbrances are of such a nature that the vendor is unable to clear them off, the purchaser will be entitled to recover all his costs from the vendor,

including that of the conveyance also, if any such has been prepared; and this, it seems, whether the search was made before or after such preparation.

Search for judgments should be postponed. when and under what circumstances.]—If the vendor's solicitor, on being asked, replies that there are no judgments, the search had better be postponed until immediately before the execution of the conveyance: (*Richards v. Barton*, 1 Esp. N. P. C. 268.)

Distinction between the ancient and the modern practice as to searching for judgments.]—The search for judgments is now attended with much less trouble than formerly. Previously to the statute 1 & 2 Vict. c. 110, the practice was to search for judgments for ten years, and if any judgments appeared within that time, to search for ten years from the time of the most early judgment, and in like manner for ten years from each judgment which was so found, stopping at the period when the owner became adult, unless there was reason to suppose there were judgments against him whilst a minor. But now all judgments, in order to become binding upon purchasers, must, in pursuance of the statute 1 & 2 Vict. c. 110, be registered every five years, so that at the present day there is no occasion to extend the search beyond that period.

Protection afforded to purchasers by statute 18 Vict. c. 15.]—And by the recent statute, 18 Vict. c. 15, for the better protection of purchasers against judgments, crown debts, cases of *lis pendens* and life annuities, or rent-charges, it is enacted, that where by the said act 2 & 3 Vict. a registry of judgments, &c. is required within such period of five years as is therein mentioned, in order to bind purchasers, mortgagees, and creditors, it shall be deemed sufficient to bind such purchasers, mortgagees, and creditors, if such a memorandum or minute as was required in the first instance is again left with the senior Master of the Common Pleas within five years before the execution of the conveyance, settlement, mortgage, lease, or other deed or instrument vesting or transferring the legal or equitable right, title, estate, or interest in or to any such purchaser or mortgagee for valuable consideration, or as to creditors, within five years before the right of such creditors accrued, as directed by the said last-mentioned act, although more than five years shall have expired by effluxion of time since the last previous registration before such last-mentioned memorandum or

minute was left, and so, *toties quoties*, upon every register: (sect. 6.)

As to judgments removed from inferior to superior courts.]—When judgments of inferior courts are removed to the superior courts, they are to be re-registered, or registered, as the case may be (sect. 7); but it is expressly declared that nothing in the act shall be construed to revive extinguished judgments: (sect. 8.) (*See the form of bill of costs for searching for judgments*, Gilb. Costs, 352, 3rd edit.)

As to unregistered orders in bankruptcy.]—No order in bankruptcy is to affect lands until registered: (sect. 10.)

As to judgments entered up against a mortgagor.]—Mr. Prideaux, in his able Treatise on the Law of Judgments, says (pp. 81, 82): "It may be useful to observe, by way of caution, that all judgments entered up against a mortgagor subsequent to the mortgage, are charges upon the surplus of the moneys arising from a sale under a power contained in the mortgage deed, and that the mortgagee would be bound to apply such surplus in the proper discharge of all such judgments of which he has notice." Remarking, at the same time, that "there was no reason to doubt that even under the old law all such judgments were general charges in equity upon the surplus moneys in the hands of the mortgagee;" in support of which argument he refers to Mr. Serjeant Hill's opinion, stated in *Forth v. Duke of Norfolk* (4 Mad. 506.)

As to judgments and Crown debts against mortgagees who have been paid off.]—The act 18 Victoria, c. 15, after reciting that "great delay and expense are occasioned upon purchase and mortgages of land in consequence of judgments against mortgagees and Crown debts and liabilities to the Crown of mortgagees continuing to bind lands although the mortgagees have been *bonâ fide* paid off, and the lands have been actually conveyed to purchasers, or to other mortgagees; for remedy whereof" proceeds to enact, that "where any legal or equitable estate or interest, or any disposing power in or over any lands, tenements, or hereditaments shall, under any conveyance or other instrument executed after the passing of this act, become vested in any person as a purchaser or mortgagee for valuable consideration, such lands, &c. shall not be taken in execution under any writ of *elegit*, or other writ of execution, to be sued upon any judgment, or any

decree, order, or rule against any mortgagee or mortgagees thereof, who shall have been paid off prior to or at the time of the execution of such conveyance; nor shall any such judgment, decree, order, or rule, or the money thereby secured, be a charge upon such lands, &c., so vested in purchasers or mortgagees, nor shall such lands, tenements, or hereditaments so vested in purchasers or mortgagees be extended or taken in execution or rendered liable under any writ of extent or writ of execution, or other process issued by or on behalf of Her Majesty or her successors in respect of any judgment, statute, or recognizance obtained against or entered into by, or inquisition found against, or obligation or specialty made by, or acceptance of office by any mortgagee or mortgagees, whereby he or they hath or have become or shall become a debtor or accountant or debtors and accountants to the Crown, where such mortgagee or mortgagees shall have been paid off prior to or at the time of the execution of such conveyance as aforesaid :” (sect. 11.)

As to life annuities and rent-charges.—Whenever there was any suspicion that any annuities not disclosed by the abstract were chargeable on the property, the practice has been to make a search for memorialized annuities, except the lands happen to lie in a register county, in which case it was considered sufficient to search the registry office only; but now, under the above-mentioned enactment of the 18 Vict., life annuities and rent-charges are not to affect lands as to purchasers, unless a memorandum is left with the senior Master of the Court of Common Pleas at Westminster, who is forthwith to enter the particulars in a book, in alphabetical order, in the name of the person whose estate is intended to be affected by the annuity or rentcharge, together with the year and day of the month when any such memorandum or minute is so left with him; and all persons shall be at liberty to search the same book, together with the other books and registers in the office, on payment of the sum of one shilling : (sect. 12.) Searches may also be made by the parties, under proper regulations, in the office, and the sum of one shilling only shall be payable on one search, although more names than one shall be searched for, where such names relate to the same transaction : (sect. 13.)

As to annuities given by will.—Annuities given by will are excepted from the act : (sect. 14.)

Search must now be made, as well in the case of leasehold or copyhold as of freehold estates.—The search for judg-

ments must now be made where the property is of leasehold or of copyhold tenure, in the same way as in the case of freehold estates; and, notwithstanding it was formerly considered that leasehold estates were only bound from the time the writ of execution was delivered into the sheriff's office (*Jones v. Atherton*, 2 Marsh, 275; see also *Burdon v. Kennedy*, 3 Atk. 379; *Jeans v. Wilkins*, 1 Ves. 95), the statute 1 & 2 Vict. c. 110, has rendered them liable to judgments in like manner as freeholds. (See *Prideaux on Judgments*, 59, 72.)

Entailed property, how far liable to judgments.—Entailed property is by the above-mentioned enactment (1 & 2 Vict. c. 110) also rendered liable to judgments, which are binding, not only on the tenant in tail, but on the issue in tail and remainder-man, where the entail was capable of being barred without the consent of the protector; so that a search for judgments is just as necessary in purchases from tenants in tail as of premises holden for any other estate.

Search necessary, even in purchases from assignees of bankrupts.—Nor can such search be dispensed with, even where the sale is made by the assignees of a bankrupt; for, notwithstanding the statute now under consideration provides that the judgment creditor shall not be entitled to a preference in the case of the bankruptcy of the person against whom such judgment shall be entered up, unless such judgment shall have been entered up one year at least before the bankruptcy, it does not deprive him of such preference where such judgment has been entered up prior to that period. The search may, however, in such cases be restricted to the commencement of one year next preceding the bankruptcy.

Facilities afforded by recent enactments in the search for judgments.—The inconvenience and uncertainty that was formerly incurred in searching for judgments, which was exceedingly great where a vendor had a common name applicable to a great number of other persons—as the Smiths, Browns, Jones's, or Robinsons, or many others—are to a great extent remedied by the 19th section of the statute now under consideration, by which it is provided that no judgment shall affect any purchaser, unless a minute containing the name and usual or last place of abode, and the title, trade, or profession of the person whose estate is to be affected thereby, shall be left with the senior Master of the Court of Common Pleas, who shall enter the name in a book, in alphabetical order, by the name and addition of such person.

Search can rarely be safely dispensed with.—At the present day, therefore, a purchaser's solicitor can rarely with perfect safety dispense with searching for judgments; because, although the 13th section of the act 1 & 2 Vict. c. 110, declares that purchasers, *without notice*, shall not be deprived of the equitable protection they previously possessed, still, notice might possibly be inferred from very slight circumstances, and if proved, would give the judgment creditors the benefit of those extensive remedies the act confers upon them: (Prideaux on Judgments, 55.)

Purchaser's solicitor liable for losses incurred by his omitting to search for judgments.—And a purchaser's solicitor should be careful to search for judgments, as well for his own sake as for that of his client; for should the latter sustain any injury in consequence of this omission on the part of his solicitor, the latter will become personally liable to make good the same, which the client may recover from him by action at law: (*Forshall v. Jones*, 1 Vin. Abr. 54; *Brooks v. Day*, 2 Dick. 572; *Green v. Jackson*, Peake, N. P. C. 336; *Baker v. Chandless*, 3 Camp. N. P. C. 17; *Ireson v. Pearman*, 5 Dow. & Ry. 187; *Jones v. Lewis*, 9 Dowl. 143.)

Crown debts.—Where it is at all probable that the vendor is an accountant to the Crown, a search should be made for Crown debts. This must be made in the same office in the Common Pleas where judgments are to be searched for: (2 Vict. c. 11, s. 8.) The act of 1 & 2 Vict., however, only relates to Crown debts created or secured before the 4th of June, 1839. If, therefore, it is at all likely that Crown debts may have been incurred previously, further inquiries should be made to ascertain whether or not they are still subsisting. If still in existence, the purchaser may now be exonerated therefrom by paying the same into the Exchequer, under the provisions of the statute 1 & 2 Geo. 4, c. 121, s. 10, previously to which a purchaser would not have been secure, although his money was actually paid into the Exchequer, unless he had obtained a *quietus* to be entered up of record.

Lis pendens.—Where there is any reason to suspect that a suit is pending respecting the property, the same office in the Common Pleas should be searched for the purpose of ascertaining that fact, which, unless a memorandum or minute is left with the senior Master of the Common Pleas, who is to enter the particulars in a book, in alphabetical

order, will not be binding on a purchaser unless it can be shown that he has had express notice of such pending suit. As there must be a re-entry every five years, it will be sufficient to limit the search to within that period: (2 & 3 Vict. c. 11, s. 3.)

Searches to be made in case of suspicion of insolvency.—Whenever a vendor is known to have been in difficulties, it will be prudent to search the Insolvent Courts.

Inquiries to be made in case of suspicion of acts of bankruptcy.—When a vendor was in trade the practice formerly was, whenever there was any apprehension of his having committed an act of bankruptcy, to search the Bankruptcy Court for any affidavit of debts which might have been made the foundation of a commission or fiat in bankruptcy; but, as now, all *bonâ fide* conveyances by a bankrupt previously to the issuing of a fiat against him were rendered valid, notwithstanding a prior act of bankruptcy, unless the purchaser had notice of it (1 & 2 Vict. c. 4); and as the issuing of a fiat, or any other proceedings in bankruptcy, is certain to be known to all parties having immediate transactions with the bankrupt, a search or inquiry of this nature is now rarely made. Where, however, a vendor is a certificated bankrupt, who contracts to sell property acquired by him subsequently to his bankruptcy, the purchaser's solicitor ought to see that the certificate of conformity has been duly and properly enrolled.

Duty of purchaser's solicitor where the lands lie in a register county.—Where the lands lie in a register county, the purchaser's solicitor must not only see that every document required to be registered has been duly registered, but he must also search the register offices to ascertain that there are no registered incumbrances affecting the property. And notwithstanding the practice may not be to register wills, the purchaser has a right to insist upon this being done, and his solicitor should take care to see that this be done before he permits his client to complete the purchase, as another *bonâ fide* purchaser, without notice of the will, would, by registering his conveyance, be entitled to a preference to a devisee under the will and all persons claiming under him: (*Jolland v. Stainbridge*, 7 Ves. 478.)

Inadequacy of price not generally considered a sufficient ground for rescinding a contract.—Inadequacy of price will

not, generally speaking, form a sufficient ground for resisting a specific performance either by a vendor (*City of London v. Richmond*, 2 Vern. 242; *Laville v. Laville*, 1 P. Wms. 745; *Adams v. Weare*, 1 Bro. C. C. 567), or by a purchaser: (*Coles v. Tregothic*, 9 Ves. 234; *Lowther v. Lowther*, 13 ib. 95; *Weston v. Russell*, 3 Ves. & Bea. 187.) But where a person has been induced to offer, or to accept, an inadequate price through the fraudulent misrepresentation of the other party, or the grossness of inadequacy is such as to be of itself evidence of fraud, a Court of Equity will not afford its aid in enforcing a performance in specie: (*James v. Morgan*, 1 Lev. 111; *Dean v. Rastron*, 1 Anstr. 64; *Conway v. Shrimpton*, 5 Bro. P. C. 187; *Buxton v. Cooper*, 3 Atk. 363.) So, also, as we have previously noticed, the employing puffers to bid at a sale by auction, for the purpose of screwing up the price, is considered so fraudulent an act towards the real bidder, that any purchaser, under such circumstances, would be entitled to rescind the contract: (see *ante*, p. 77, and the cases there referred to.)

As to copyholds.]—Whenever the lands are of copyhold or customary tenure, the court rolls should be inspected for the purpose of ascertaining whether any of the documents have been left out of the abstract.

Costs for unnecessary search will not be allowed.]—A purchaser's solicitor must be careful, whilst he omits no search or inquiry that is in any way essential to his search or inquiry, that he does not carry it on to an unreasonable or unnecessary extent; for if he does so, he will not, upon taxation, be allowed his costs for making it. And, even where searches have been directed by counsel, or purchaser's solicitor has not been allowed his costs, even as between solicitor and client, where, to his own knowledge, subsequent events have rendered those searches unnecessary: (*Langford v. Mahony*, 3 J. & L. 97.)

Course to be pursued where purchaser is willing to accept an imperfect title with an indemnity.]—It sometimes, however, happens in the case of a willing purchaser, that, notwithstanding the title may be a very imperfect one, and there may be incumbrances upon it, of a nature the vendor is unable to discharge, still a purchaser may be willing to accept a title so circumstanced, provided he be sufficiently indemnified from any damage or injury he may sustain in consequence of any of those charges upon the property,

although he cannot be compelled to complete the contract upon such indemnity, or require the vendor to fulfil the contract upon those terms. In a case of this kind, the purchaser should state his objection, and at the same time propose upon what terms he will accept the title.

Right of vendor to rescind contract.—And as on the one hand, a purchaser may rescind the contract for any of the causes before mentioned, so, on the other hand, if a purchaser fails in performing his part of the agreement, the vendor will, in like manner, be authorized to annul it altogether. The usual grounds upon which a vendor rescinds a contract is, that the purchaser is not ready to complete his purchase at the time appointed by the contract or conditions of sale, or has by his own laches or neglect deprived himself of all right to a specific performance. Hence, where the contract or conditions provide that time shall be made part of the essence of the contract (see the form 1 Con. Prec., Part I, No. III, clause 6, p. 17), the vendor will, immediately upon breach of this condition by the purchaser, be entitled to annul the sale, and dispose of the property in any manner he may think proper, and also take proceedings against the purchaser for his breach of contract; but these are subjects we shall enter more fully into hereafter.

Where time is not made the essence of the contract.—But where time has not been made part of the essence of the contract, it does not appear to be satisfactorily determined how long a period may be allowed to elapse before the contract will be permitted to be rescinded by the one party, on account of its non-performance on the part of the other. Thus much, however, does appear certain, namely, that equity will assist no one who has not shown himself desirous, prompt, and at all times eager and ready to complete his bargain; for a Court of Equity always discountenances laches or neglect: (see *Grounds and Rudiments of Law and Equity*, 18; and 1 *Mad. Pract.* 416, 2nd edit. ; and the cases there referred to.) In a recent case, *Firth v. Greenwood* (25 L. T. Rep. 5), a delay of three years by a purchaser was held to preclude him from a bill for a specific performance.

Whether, if time is not made the essence of the contract, any subsequent acts can make so.—When time has not been originally made the essence of the contract, it seems doubtful whether any subsequent notice or intimation of the

parties can render it so ; and Sir John Leach, said (*Reynolds v. Nelthorpe*, 6 Mad. 18), that it may be considered the settled doctrine of the court, that by the terms of the agreement, time may be made the essence of the contract ; but that it had not been decided that where there is no stipulation in the contract, time may be made essential by subsequent notice ; and he added, that in the case then before him, he should leave the point untouched.

XI. OF THE ACCEPTANCE OF THE TITLE OR ABANDONMENT OF THE CONTRACT.

If purchaser's solicitor approves of title, he should give early notice thereof to vendor's solicitor.—If the vendor has succeeded in removing all objections raised upon the title, and complied with the requisitions demanded of him by the purchaser's solicitor, and the comparison of the documents with the abstract proves satisfactory, so that there is no longer any objection to the title, the latter should give early notice of that circumstance to the vendor's solicitor, acquainting him at the same time that he has accepted the title on behalf of his own client.

Course purchaser's solicitor should adopt when the title proves defective.—But if after a careful investigation it appears that the vendor cannot confer a good and marketable title, or that the property is subject to incumbrances he is unable to discharge, or that he has not the duration of interest which he pretended to sell, or that such property has been misdescribed, or there has been a total or partial failure of the consideration, or any material alteration made in the premises by the vendor, or under his sanction or authority subsequent to the contract, whereby the purchaser may be in any way prejudiced, then the purchaser's solicitor should give immediate notice to the vendor that his client will rescind the contract. Or where the circumstances will admit of it, and the purchaser is desirous that such should be done, instead of annulling the contract, to insist upon its fulfilment, and that the purchaser shall be allowed sufficient compensation, by a deduction of purchase money, to make up for such defects, whatever they may be.

Notice of grounds of objection to title should be given.—When the contract is rescinded by a purchaser on account of the vendor's incapability to make a marketable title, the purchaser's solicitor must be careful to set the whole of the

grounds of objection in his notice to the vendor of the purchaser's intention to annul the contract; for unless this be done, a purchaser would not, in case of his bringing an action at law upon the contract, be permitted at the trial to insist upon any objection to the title that appeared on the face of the abstract, which he neglected to take at the time of rescinding the contract, and which might have been removed by the vendor if taken before: (*Todd v. Hoggart*, 1 M. & M. 128.)

XII. OF THE PROPERTY IN THE ABSTRACT.

When general property subsists both in vendor and purchaser.—As long as the contract remains open, the general property of the abstract is neither in the vendor or the purchaser. If the contract is completed, it becomes the absolute property of the purchaser; if the contract is rescinded, it reverts back again to the vendor: (*Roberts v. Wyatt*, 2 Taunt. 278.)

Property of the purchaser in the abstract pending the contract.—In the mean time, until the contract is either completed or annulled, the purchaser is entitled to retain the abstract in his possession, for the following purposes:—

1. To enable him to ascertain whether the vendor can confer a good title to the property.
2. For the purpose of taking the opinion of counsel upon it.
3. For the purpose of aiding him in the further investigation of the title.
4. To assist him in preparing the conveyance, by enabling him to see what persons are the proper conveying parties; what mode of assurance it may be most expedient to adopt, and what parcels are to be inserted, and so forth.

Purchaser's right to retain abstract may subsist, notwithstanding he has rejected the title.—The purchaser's right to retain the abstract does not necessarily cease by the circumstance of his rejecting the title, for in such case, his right of retention will continue until the dispute is finally settled, to enable him to justify his rejection of the title, and to show upon what grounds he did so.

Vendor entitled to have abstract returned to him when contract is totally rescinded.—But when the dispute is

determined, and the whole contract totally rescinded, the purchaser is bound to return the abstract to the vendor, whose absolute property it then becomes: and a vendor's solicitor should lose no time in calling upon the purchaser's solicitor to return it, as it might prove prejudicial to a vendor's interest to have the weakness of his title exposed in the hands of persons who, having abandoned the contract, have no right whatever to have anything further to do with the property; and for the same reason, the purchaser's solicitor should forward any copy or extracts he may have of the abstract at the same time that he returns the latter to the vendor; or otherwise, he ought to destroy them; for it would be a pernicious thing if accounts of a person's title, and particularly where that title is a defective one, could get abroad, and such copies or extracts might possibly be applied for very mischievous purposes: (*Roberts v. Wyatt*, 2 Taunt. 278.)

As to the property in counsel's opinion taken upon the title.] — With respect to right to any counsel's opinion that may have been taken upon the title, the rule appears to be, that upon the abandonment of the contract, the vendor is entitled to have it forwarded to him with the abstract; for as he is bound to repay the purchaser the costs he has incurred in procuring such opinion, it is but just that he should have it for whatever it may be worth; but it is only on the ground that he has defrayed the expenses of taking the opinion that the vendor is entitled to have it handed over to him; for, if upon being called upon by the purchaser for the payment of these costs, he refuses to discharge them, the purchaser will be entitled to retain the opinion, or to erase it, as also any observations or opinions which may have been written on the abstract, so as altogether to debar the vendor from reaping any advantages from them, unless the purchaser's costs in respect of the same are satisfied: (*Wood v. Court*, Hil. Term, 1827, referred to 19 L. T. Rep. 199.)

Right of rescinding contract may be lost by subsequent acquiescence.] — A party who is desirous of rescinding a contract must be careful not to do any act which may be construed as a confirmation of it, for if he does so, his right to annul the contract will be waived, and he will be held to his original bargain.

Costs.] — If the contract is rescinded on account of the

vendor's failing to make out a marketable title to the property, the purchaser will be entitled to call upon the former to defray all reasonable expenses incurred by the latter in the investigation, including, also, money paid as fees for the opinion of counsel, either upon the abstract, or any other point that may have arisen respecting the title: (*Fleureau v. Thornhill*, 2 Bl. Rep. 1078.)

XIII. OF THE INVESTIGATION OF THE TITLE, AND OTHER INTERMEDIATE PROCEEDINGS, WHERE THE SALE IS MADE UNDER THE DECREE OF THE COURT OF CHANCERY.

1. Investigation of Title.
2. Paying in of Purchase Money, and delivery of Possession.
3. Substitution of Purchasers.

1. *Investigation of Title.*

Course of proceeding where the sale is made under a decree.—When real property is sold under the decree of a Court of Equity, the vendor's solicitor must, as in ordinary cases, deliver the abstract to the purchaser or his solicitor within the time specified on the conditions of sale (15 & 16 Vict. c. 86, s. 56), and if he fails in so doing, an order may be obtained for this purpose on motion by notice, or on application at chambers: (Ayck. 433, 5th edit.)

Duties of purchaser's solicitor with respect to the investigation of the title.—With respect to the duties of the purchaser's solicitor in sales of this kind, it will be necessary for him not only to investigate the title with the same vigilance he ought to exercise in ordinary sales, but also to be certain that the sale is made in strict accordance with the decree (*Colclough v. Sterum*, 3 Bli. 181); added to which, he must also see that all persons who are necessary conveying parties are before the court; for if he takes a title which a decree in an imperfect suit does not protect, he must take the consequences: (*ib.*)

Purchaser may abandon sale where there is an error in the decree.—If the purchaser's solicitor discovers any error in the decree he may abandon the contract, as the court will not, under such circumstances, compel a purchaser to take an estate sold under it, notwithstanding the parties are proceeding to rectify the error: (*Lechmere v. Brazier*, 2 J. & W.

287; *Calvert v. Godfrey*, 6 Beav. 97; *Sherwood v. Beverage*, 13 Jur. 1042; Ayck. 433, 5th edit.)

Proper course where purchaser's solicitor finds objections which cannot be disposed of out of court.]—If, upon the investigation of the title, the purchaser's solicitor discovers any objections which cannot be disposed of out of court, the proper course is to carry such objections before the judge in chambers, when the vendor will be required either to remove them, or argue them in open court: (*Pegg v. Wisden*, 16 Jur. 1105.) In such case, also, a reference may be made to the conveyancing counsel: (Ayck. 434, 5th edit.)

Reference to counsel has superseded practice of referring to Master.]—This course of proceeding by reference to the conveyancing counsel has superseded the former practice of referring matters of this kind to the Master, and is authorized by the statute 15 & 16 Vict. c. 80, s. 40, by which it is enacted that it shall be lawful for the court, or any judge thereof, when sitting at chambers, to receive and act upon the opinion of conveyancing counsel in actual practice, to be nominated as thereafter mentioned, in all cases in which, according to the practice of the court and of the Master's office, it has been usual for the Master to require or receive the opinion of conveyancing counsel, for his aid and assistance in the investigation of the title to an estate with a view to the investment of money in the sale or mortgage thereof, or with a view to the sale thereof, or in the settlement of a draft of a conveyance, mortgage, settlement or other instrument or otherwise, and in such other cases as the Lord Chancellor shall by any General Order direct.

Party dissatisfied with conveyancing counsel's opinion may object to it.]—But it shall be competent for any party to object to any opinion of any such counsel when he shall deem it open to objection, and thereupon the point in dispute shall be disposed of by the court, or by the judge sitting in chambers, according to the nature of the case: (*ib.*)

How business is to be distributed amongst counsel.]—The business to be referred to the conveyancing counsel nominated by the Lord Chancellor under the above-mentioned act, and who are six in number, is to be distributed amongst them in rotation by the first clerk to the registrars for the time being; and during his occasional or necessary absence, by the second clerk to the registrars for the time

being; and during the occasional or necessary absence of both such clerks, then by such one of the other clerks to the registrars as the first registrar for the time being may nominate for that purpose: (1st Order, 16th December, 1852; Ayck. 421, 5th edit.)

Clerk making distribution to be responsible that the business is regularly distributed..]—The clerk making such distribution as aforesaid is to be responsible that the business is distributed according to regular and just rotation, and in such manner as to keep secret from all persons the rota or succession of conveyancing counsel to whom such business is referred; and it shall be his duty to keep a record of such references, with proper indexes, to enter therein all such references: (2 *ib.*; Ayck. 421, 5th edit.)

Memorandum of directions for reference to be signed by registrar or judge's chief clerk..]—When the court, or a judge sitting at chambers, shall direct any business to be referred to any such conveyancing counsel, a short memorandum or minute of such direction is to be prepared and signed by the registrar, if the same shall have been given in court, or by the judge's chief clerk, if given in chambers; and the party prosecuting such objection, or his solicitor, is to take such memorandum or minute to the registrar's clerk, whose duty it shall be to make such distribution as aforesaid; and such clerk is to add at the foot thereof, a note specifying the name of the conveyancing counsel in rotation to whom such business is to be referred, and such memorandum or minute is to be left by the party prosecuting such direction, or his solicitor, with such conveyancing counsel, and shall be a sufficient authority for him to proceed with the business so referred: (3 *ib.*)

Course to be adopted where counsel in rotation is unable to accept reference..]—In case the conveyancing counsel shall from illness, or any other cause, be unable or decline to accept any such reference, the same shall be offered to the other conveyancing counsel appointed as aforesaid successively, according to their seniority at the bar, until some one of them shall accept the same: (4 *ib.*)

Preceding orders not to interfere with power to direct reference of any one of conveyancing counsel..]—The preceding orders are not to interfere with the power of the court, or of the judge sitting at chambers, to direct or transfer a

reference to any one in particular of the said conveyancing counsel, where the circumstances of the case may, in his opinion, render it expedient: (5 *ib.*)

2. *Paying in of Purchase Money, and delivery of Possession.*

Purchaser entitled to possession on payment of purchase money.—If the purchaser's solicitor is satisfied with the title, and that the sale is made in accordance with the decree, his next step will be to pay in the purchase money, upon doing which the purchaser will be entitled to be let into the possession and receipt of the rents and profits of the purchased premises.

Course to be pursued where purchaser is desirous to obtain possession before title is investigated.—If the purchaser is desirous of being let into possession before the title is investigated, the application should be made that such acceptance of possession is to be without prejudice to any objections that may be taken to the title, which are not to be considered as thereby waived. But a purchaser will not be allowed to pay in his purchase money without accepting the title, where there are any special circumstances to induce the court, as, for the purpose of preventing the accrual of interest: (Ayck. 434, 5th edit.; *Morris v. Bull*, 17 L. J. 9; 12 Jur 4; *Dempsey v. Dempsey*, 1 De Gex & S. 691; but see *Ouseley v. Anstruther*, 11 Beav. 399.)

Purchase money cannot be paid in without an order from the court.—The purchase money cannot be paid in without an order from the court. This is in accordance with the provisions of the 26th section of the act 15 & 16 Vict. c. 80, by which the judges have determined that applications for payment into court of purchase moneys under sales, and investing the same, may be made at chambers.

How order is to be obtained.—For this purpose a summons must be taken out, which may be had at the law stationers, duly stamped, and this must be filled in with a statement of the nature of the application, and the solicitor's name and address must be endorsed at the foot. This must be taken, together with the copy, to the judge's clerk, who will then give an appointment, and make an entry thereof, and at the same time he will seal the summons and file the copy.

Fees for summons, and duplicate.—The fee for every

original summons for the purpose of proceedings originating at chambers, is 5s.; and for every duplicate thereof, 5s.; and for every summons, 3s.; payable by means of stamps: (6th Order, 25th October, 1852.) The fee for entering and filing duplicate is 5s., payable by means of a stamp: (6th Order, 25th October, 1852.)

Service of summons.—A fair copy of the summons must be made out and served on the opposite party, or his solicitor or agent, as the case may be, at the same time producing the original; after which an affidavit of service must be made and filed, and an office copy procured: (Ayck. 412, 5th edit.)

Vendor's solicitor only is entitled to appear on the application to pay in purchase money.—The vendor's solicitor only is entitled to appear on the application to pay in the purchase money, whose duty it will be to see that the amount of the money to be so paid in, and the time when possession is sought, are correctly set out. In case there are any other special matters connected with such payments and delivery of possession, as where any interest is to be paid on the purchase money, or any sum is to be paid for the timber on the estate, he should be careful to see that proper provision has been made on each of these points; and he should ask that such purchase moneys, &c., when paid in, together with all accumulations, may be laid out in the purchase of Bank annuities: (Ayck. 435, 5th edit.)

How purchase money is to be paid in.—When the order is procured, it should be taken by the purchaser to the Accountant-General's office, where he must bespeak a direction to the Bank of England to receive the money, which may generally be obtained on the second day following. The direction being obtained, it is then taken to the Bank of England, together with the cash to be paid in, and the solicitor writes his name and address at the top of the notes in front, and hands them to one of the cashiers in the hall, who marks, cancels and returns them to him. If there is any balance in cash, it is paid in to one of the tellers at the counter, who gives a ticket for the amount; after which the direction, together with the notes and ticket, is taken to the Chancery department in the Bank, where a receipt may be obtained for the amount which should be then taken to the cashier in the hall for his signature. The receipt must afterwards be left at the Accountant-General's office, from

whence may be obtained the direction. An office copy of the receipt, and of the Accountant-General's certificate thereof may be obtained, if required, on application at the Report Office : (Ayck. 363, 5th edit.)

Certificate of payment is at purchaser's expense.—The purchaser must, at his own expense, obtain the certificate of the payment of the purchase money, when it is paid in according to the order.

Purchaser not permitted to deduct income tax out of interest.—A purchaser will not be permitted to deduct the amount of income tax out of the interest of any purchase money paid in by him : (*Holroyd v. Wyatt*, 17 L. J. 9 ; *Dawson v. Dawson*, 11 Jur. 984 ; *Flight v. Comac*, 2 Eq. Rep. 1134.)

Where the estate is sold subject to incumbrances.—Whenever the property is sold subject to any incumbrances, the purchaser should, after giving notice of his intention, apply to the court for leave to pay off the charge, and to pay the residue of the purchase money into the Bank. But unless an incumbrance appears on the report, it seems, the purchaser will not be allowed to apply part of his purchase money in discharge of it, where any of the parties refuse or are incompetent to consent, as for instance, where some of them are minors ; because, in a case of this kind there is nothing to show the courts that there was such an incumbrance ; though perhaps, if the parties were competent to consent, and did consent, it might be done : (—— v. *Stretton*, 1 Ves. jun. 266.)

If there are more purchasers than one, the entire sum must be paid in.—Where two or more persons purchase one lot, the purchase money must be paid altogether, to avoid the confusion likely to be occasioned if the money was allowed to be paid in separately : (*Darkin v. Marye*, 1 Anstr. 22 ; *Bulmer v. Allison*, 15 L. J. 11.)

Purchaser, on paying in purchase money, entitled to the possession, &c.—A purchaser on paying in his money is entitled to be let into the possession and rents and profits of the estate, and upon due service of the order for the delivery of possession, the purchaser may enforce the order : (13th Order, August, 1841.)

Course of proceeding.—To obtain the order for this writ, a copy of the decree must be served on the defendant, and a demand of possession must be made by the party to whom possession is ordered to be given, or by some one duly authorized by power of attorney, after which an affidavit of service of the decree, and of demand and non-compliance must be made and filed, and if the order is granted, it is drawn up in the usual way.

Writ, how to procure, &c.—The writ may be obtained at the law stationers, and being filled up, must be indorsed with the name and address of the solicitor or agent; after this a præcipe must be prepared, which, together with the writ and order, must be taken to the Clerk of Records and Writs in whose division the suit may be, who will seal the writ and file the præcipe and order, the fees for which will be 1*l.* payable by means of a stamp: (Ayck. Pract. 200, 5th edit.)

Writ must be directed to sheriff.—The writ is directed to the sheriff of the county in which the lands lie, and authorizes him to enter the premises, and eject the defendant, and put plaintiff into possession, which, upon the writ being forwarded to him, he will proceed to do accordingly: (*ib. id.*)

As to the rents and profits.—With respect to the rents and profits, the rule of the Court of Chancery in the case of fee simple estates is to allow the purchaser the rents and profits from the quarter day preceding the payment of the purchase money: (*Twigg v. Fifield*, 13 Ves. 517; and see *Garrick v. Earl Camden*, 2 Cox, 231), but the rule is otherwise with respect to the profits of a colliery, or of mines of any kind or description; because in property of the latter kind there are no such things as the fixed quarter day or quarterly payments, the profits being generally settled monthly, and the purchaser is only entitled to the profits from the commencement of the month in which he purchased, upon paying his purchase money, in the course of that month: (*Wren v. Kirton*, 8 Ves. 502; *Williams v. Attenborough*, Turn. & Russ. 70.)

Where payment is delayed by purchaser, he will be entitled from time of payment only.—And whatever be the nature of the property, if the purchaser delays the payment of the purchase money without any default on the vendor's part, he will be entitled to no rents and profits whatever prior to the time of such payment: (*Lloyd v. Waite*, 1 Turn. 70.)

Purchase money lying unproductive insufficient to entitle purchaser to receive rents accrued previous to quarter day.]

—Neither will a purchaser be entitled to the rents for a period beyond the quarter day preceding the payment of his money, merely because he has had his money lying unproductive in his banker's hands: (*Howland v. Norris*, 1 Cox, 59; *Powell v. Martyr*, 8 Ves. 146; *Barker v. Harper*, Geo. Cooper, 32.)

Purchaser only entitled to profits actually belonging to the quarter.]—Neither will a purchaser be entitled to any profits not really belonging to the quarter; hence the purchaser of a manor is not allowed to receive any fines payable on account of the death of copyholders before the quarter, although the admissions do not take place until afterwards: (*Garrick v. Lord Camden*, 2 Cox, 231.)

When mortgagee purchases equity of redemption.]—When a mortgagee purchases the equity of redemption of his mortgagor, and his principal and interest calculated up to the last quarter day exceed the purchase money, the mortgagee will be let into possession as from the *preceding* quarter day.

Annuity.]—When the subject-matter of purchase is a life annuity, the purchaser will be entitled to receive it from the time he could have confirmed the report absolutely, and he pays interest on his purchase money from that time: (*Twigg v. Fifield*, 13 Ves. 517; *Vesey v. Elwood*, 1 Flan. & Kel. 667; 3 Dru. & War. 75.)

Course of proceeding where purchaser neglects to pay money in due time.]—If the purchaser neglects to pay in the purchase money in due time, the plaintiff may apply for an order that such payment shall be made within some specified time, together with the costs of the application, which will be ordered accordingly. Still, such an order cannot be obtained until either the purchaser has accepted the title, or upon a reference it has been reported that a good title can be made: (*Rutter v. Marriott*, 10 Beav. 33.) The order having been drawn up, a copy duly indorsed, as in the case of a decree, must be served personally upon the purchaser, and if he neglects to comply therewith, it may be enforced in the usual way: (Ayck. 436, 6th edit.)

If purchase money be not paid, and purchaser does not appear to have the means of paying it, vendor may rescind

contract.]—When the purchaser fails to pay in the purchase money, and it appears that he has not the means of doing so, the vendor, instead of proceeding to enforce a specific performance of the contract, may apply to the court to have the purchaser discharged from his bidding, and that the estate may be resold (*Hodder v. Ruffin*, 1 Ves. & Bea. 544), in which case the purchaser will be ordered to pay not only the expenses arising from the non-completion of the purchase, but also of the application, and the resale, and the deficiency in price, if any such should be incurred upon such second sale (*Harding v. Harding*, 4 M. & C. 514; *Gray v. Gray*, 1 Beav. 199); but the vendor will be entitled to retain any increase of price that may be gained thereby.

Vendor entitled to hold purchaser to his contract.—But a vendor may, if he pleases, hold the purchaser to his contract, and the court, on his application, will make an order that he shall, within a given time, pay in his money, or stand committed: (*Lansdown v. Elderton*, 14 Ves. 512.)

Purchaser entering into possession bound to pay in the purchase money.]—If the purchaser enters into possession, even with the consent of the vendors, the court will compel him to pay in his money immediately; for the court only can give this permission; and if he obtains possession without the vendor's consent, or by any other improper means, he will not only be compelled to pay in the purchase money immediately, but also to take the title as he found it: (*Wilding v. Andrews*, 1 C. Coop. 380.)

3. Substitution of Purchaser.

Purchaser cannot substitute another in his place without the leave of the court.]—It sometimes happens that a purchaser at a sale under a decree is desirous of being discharged from his contract, and of substituting some other purchaser in his place. This he cannot do without the leave of the court, which will only be granted upon the terms of the sub-purchaser paying in his purchase money, accompanied by an affidavit that there has been no under bargain: (*Kirby v. Macnamara*, 6 Ves. 515; *Dale v. Davenport*, *ib.* 615.)

How the order may be obtained.]—An order for the above purpose may be obtained on application at chambers, but the court must be satisfied, as before mentioned, by affidavit,

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that there has been no under bargain; otherwise the original purchaser might undersell to the sub-purchaser, who may give him a sum of money to be substituted in his place, and thus deceive the court: (*Ib. id.*; Ayck. 439, 5th edit.; and see also 2 Mad. Pract. 2nd edit.)

CHAPTER IV.

OF THE CONVEYANCE TO THE PURCHASER.

I. OF THE VARIOUS MODES OF ASSURANCE BY WHICH REAL PROPERTY MAY BE CONVEYED TO A PURCHASER.

1. As to freehold property.
2. As to disentailing assurances.
3. As to leasehold estates.
4. As to copyhold or customary estates.

II. PRACTICAL DIRECTIONS FOR PREPARING A CONVEYANCE OF FREEHOLD PROPERTY.

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VI. HOW THE DEED SHOULD BE PREPARED WHEN IT IS DESIGNED TO OPERATE BOTH AS A PURCHASE DEED OR A MORTGAGE.

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VIII. AS TO THE PREPARATION OF THE CONVEYANCE WHERE THE SALE IS MADE UNDER A DECREE.

I. OF THE VARIOUS MODES OF ASSURANCE BY WHICH REAL PROPERTY MAY BE CONVEYED TO A PURCHASER.

1. As to freehold property.
2. As to disentailing assurances.
3. As to leasehold estates.
4. As to copyhold or customary estates.

1. *As to Freehold Property.*

When title is approved of, purchaser's solicitor should prepare purchase deed.—When the title is approved of, and every doubt and difficulty cleared up, the next course of proceeding is the preparation of the purchase deed, and such other assurances as may be necessary for completing the purchase.

Purchaser's solicitor entitled to prepare conveyance in the absence of some stipulation to the contrary.—The preparation of the purchase deed devolves upon the purchaser's solicitor unless an express stipulation to the contrary is inserted, either in the contract or conditions of sale, or where members of the profession in certain localities have mutually agreed to adopt some different course of practice.

By whom the costs of preparing the purchase deed are to be defrayed.—The whole of the costs of preparing the purchase deed are to be defrayed by the purchaser, except where its length is considerably increased by outstanding estates which have to be gotten in, or by incumbrances it is necessary to discharge being included in it, in either of which latter cases the extra expense ought to be borne by the vendor.

Practice as to preparation of deeds by counsel.—In London, most of the large solicitor's offices have all their purchase deeds prepared by counsel; but in the country a very different practice prevails, as there, very few offices have the whole of their drafts prepared by counsel, whilst the greater number, unless in purchases of large amount, or in cases of extreme difficulty, never employ counsel in this or in any other matter connected with the transaction.

How draft is usually prepared.—The draft is first written out roughly on both sides, and being looked through and settled, is fairly copied on one side only.

Costs for preparation of draft.—The solicitor's costs for preparing a purchase deed, where no counsel is employed, are as follows:

	s.	d.
Taking instructions for conveyance ...	6	8
Drawing draft, per folio ...	1	0
Fair copy for perusal ...	0	4
Engrossing conveyance, at per folio ...	0	8
Attending execution and attesting signature of witnesses ...	13	4

These charges are exclusive of outlay in respect of stamps, parchment, and paper, the costs of which may be added to the other charges; so, where any letters have been written in connection with the business, they may be charged for at the rate of from 2s. 6d. to 5s. for each letter; or, what is a very usual practice, to insert a charge for letters generally at the end of the bill, as, "letters, &c., 5s."

Charges when draft is prepared by counsel.—If the draft is drawn by counsel, the charge is 1l. 1s. for every twenty common law folios; but counsel's fees for perusing and approving drafts depend very much upon circumstances, and there does not appear to be any established rule on the subject. And again, if a draft is very difficult, and the matter important, the counsel's fee should never be less than two guineas, without any reference as to whether the draft be under or exceeding the twenty folios.

Additional charges of solicitor where draft is prepared by counsel.—If counsel is employed in preparing the deed, in addition to the above-mentioned charges, the purchaser's solicitor is allowed the following costs: a fee of 6s. 8d. for attending counsel with the instructions to prepare conveyance, as also to 13s. 4d. for perusing the draft when prepared. When the draft is prepared by the solicitor, but afterwards settled by counsel, the former is allowed to charge 6s. 8d. for attending counsel for such purposes.

Purchaser's solicitor should forward fair copy of draft for vendor's perusal.—When the purchaser's solicitor has prepared and settled the draft purchase deed, he should forward a fair copy of it to the vendor's solicitor for his inspection, and if the latter approves of the same, he should return it, with a memorandum to that effect, signed by him, at the foot of the draft.

Where the vendor's solicitor makes any alterations or additions to the draft.—If the vendor's solicitor makes any alterations or additions to the draft, he should always state that he has done so in the memorandum at the foot of the draft; as should also counsel, where the draft has been submitted to the latter to be settled and approved on behalf of the vendor. These alterations or additions are usually made in red ink, which is an advantageous plan, as the attention is thereby more easily directed to the altered parts; and for the same reason, where the same copy of the draft is submitted to the approval of several parties, any alterations subsequent to those made in red ink should be made in blue or black ink; and in every case it will be better, in the memorandum at the foot, to state the sheet or pages in which the alterations or additions have occurred.

Duties of purchaser's solicitor on receiving back the draft.—Upon receiving back the draft, with the alterations, the purchaser's solicitor must look carefully through it to see whether the alterations are in any way objectionable or prejudicial to the interests of his client, and if they are not, he should proceed with the engrossment of the deed.

Course purchaser's solicitor should adopt when he disapproves of alterations.—If he disapproves of the additions or alterations, the purchaser's solicitor should return the draft again to the vendor's solicitor, setting out his reasons for disapproval; but he should make no alterations whatever in the draft, whether trivial or important, without acquainting the solicitor of the other party therewith previously to the engrossment of the deed: (*Staines v. Morris*, 1 Ves. & Bea. 15.)

Purchaser has a right to select the mode of conveyance.—The purchaser has a right to select by what mode of assurance he will have the purchased property conveyed to him. What that mode ought to be, will depend on the nature of the purchased property; if it be freehold, several different kinds of deeds may be used, but with respect to copyhold or leasehold property, as we shall by-and-by notice, the instruments of assurance are much more limited.

Instruments employed as purchase deeds of freehold property.—The instruments adapted to the conveyance of freeholds are—1. Feoffments; 2. Release and common law;

3. Lease and release; 4. Bargain and sale; 5. Appointments; 6. Deed of grant and release; and 7. Exchange.

Feoffment.—In former times, feoffment with livery of seisin was the usual, as well as the most eligible mode of conveyance, from the circumstance of its clearing all disseisins, and thus turning all other estates and claims upon the lands into mere rights; but these important properties of a feoffment were all destroyed by the statute 3 & 4 Will. 4, c. 27, and 8 & 9 Vict. c. 106, so that now it has no greater effect than a modern deed of grant and release; and as both the giving and receiving of livery of seisin are attended with inconvenience and expense, that mode of assurance is now rarely resorted to, and will soon probably fall out of use altogether.

Feoffments rarely resorted to at the present day except for certain particular purposes.—Previously, indeed, to the passing of the two statutes we have just referred to, feoffments had almost entirely given way to the more modern mode of conveyance by lease and release, except, perhaps, in the three following instances:

1. Where the conveyance was made by a corporation, from the erroneous supposition that, as corporations could not be seised to the use of others, they could not convey by a deed operating under the Statute of Uses, on which account the practice was to make them convey either by feoffment, with livery of seisin, or by a common law lease to be perfected by entry, and a release founded thereon.

2. To save the stamp duty of a lease for a year; but this was put an effectual stop to by the General Stamp Act, 55 Geo. 3, c. 184, which charged the same amount of stamp duties on a deed of feoffment as if a deed of bargain and sale or lease for a year had been actually attached to it.

3. To acquire a tortious fee; but which is now prevented by the two recent statutes we have just before mentioned (3 & 4 Will. 4, c. 27, and 8 & 9 Vict. c. 106.)

Release at common law.—This mode of conveyance is classified under the five following heads:

1. By way of enlargement; as where a remainder-man releases to the particular tenants in possession.

2. By way of passing an estate; as where one coparcener or joint tenant releases to another coparcener or joint tenant.

3. By way of passing a right; as where a disseisee releases to a disseisor.

4. By way of extinguishment; as, if any tenant for life makes any greater estate than he is warranted in granting, and the reversioner leases to the grantee, or if the lord releases his seignorial rights to the tenant.

5. By way of entry and feoffment; as where a disseisor releases to one or two disseisees.

Essentials to the operation of a common law release.—In order to give operation to a common law release, it was requisite that the releasee should be in the actual possession of the property, the necessity of which eventually led to the introduction of the mode of assurance by lease and release, which we shall next proceed to mention.

Lease and release.—As a release could not be effectual unless the releasee, at the time of receiving it, was in the actual possession of the property, the practice first was to grant him a common law lease to be perfected by entry; when that was made, a release was given to the releasee; but it was open to the objection that, unless such actual possession was acquired by the releasee prior to his accepting the release, the assurance was incapable of passing the freehold interest. But this difficulty was easily removed by substituting a bargain and sale for a year, operating under the Statute of Uses, in the place of the common law lease; and the former instrument, by force of the statute transferring the use into possession, had all the operation of a common law lease where possession was taken by the bargainee or lessee for a year under it, and thereby enabled the latter to accept an effectual release of the property, the two instruments, bargain and sale for a year and release, forming together but one assurance; and notwithstanding the deed of bargain and sale always purported to bear date the day before the release, both instruments were in reality executed at the same time, forming one conveyance, under the general name of lease and release.

Bargain and sale.—A bargain and sale is defined as a kind of real contract founded upon some pecuniary or valuable consideration for the passing of real estates by deed indented and enrolled, deriving its effects and operation from the Statute of Uses.

Contract for sale would raise a use prior to the statute.—Before the passing of the Statute of Uses, a contract for the sale of land raised a use, to convert which into a legal estate

an actual conveyance was necessary; but this requisite the Statute of Uses supplied, by transferring the seisin of the vendor to the use of the purchaser, who, having thus the seisin and the use combined, became thereby seised of the legal estate without any further conveyance.

Bargain and sale of freeholds requires enrolment.—The statute 27 Hen. 8, c. 16, however, required this assurance to be enrolled in some of the courts at Westminster, or with the clerk of the peace of the county in which the lands are situate, within six *lunar* months from the time of the delivery (Hob. 140; 2 Jur. 673; Shep. Touch. 223), which period has been enlarged by the more recent enactment of the 3 & 4 Will. 4, c. 74, with respect to enrolments in Chancery to six *calendar* instead of *lunar* months. But, although the enrolment may be postponed until the time above mentioned, the deed itself takes effect from the time of its delivery, and not from the time of enrolment: (2 Jur. 865; *Mulleny v. Jennings*, *ib.* 674; *Thomas v. Popham*, Dy. 218.) Still, unless the deed be enrolled within the prescribed time, it becomes inoperative altogether.

Bargain and sale creating a term does not require enrolment.—But enrolment is only required where the deed of bargain and sale conveys a freehold interest; for where it merely creates a term of years, no enrolment is necessary; so that it was never deemed necessary, or became the practice, to enrol the deed of bargain and sale upon which the deed of release was founded, in conveyances by way of lease and release.

Deed of bargain and sale executes use in bargainee.—As the Statute of Uses executes the use in the bargainee, and as a use cannot be limited on a use, all ulterior uses limited to arise out of the seisin of the bargainee will necessarily be void as such, although good as trusts in equity; hence it follows, that an effectual power of appointment capable of passing the legal estate, cannot be created by a deed of bargain and sale; and as, added to this inconvenience, the expense was greater than the ordinary conveyance by grant and release, because, in addition to the costs of enrolment the same amount of stamp duty attached as if a lease for a year had been actually employed, deeds of bargain and sale enrolled have not often been employed in modern times.

Distinction between ordinary deeds of bargain and sale, and deeds of bargain and sale under the Bankruptcy Acts.—A deed of bargain and sale, under the Bankruptcy Acts, but which, except so far as copyhold estates are concerned, has been taken away by subsequent enactments, differs both in nature and quality from a deed of bargain and sale under the Statute of Uses, the latter being a contract for money or money's worth by the owner of land for the alienation of his interest, which contract raised a use in favour of the purchaser, grounded on the seisin of the bargainer, which use was by the statute executed into possession the moment the deed was enrolled; but a deed of bargain and sale under the Bankruptcy Acts was nothing more than the execution of a bare naked authority given to certain persons, by the commission or fiat in bankruptcy, to dispose of the bankrupt's estate, and has no other title to the appellation of a "bargain and sale," than what it derives from the occurrence of the words "bargain and sell," in the statute, which confers and the instrument which executes the authority: (see Hayes's Convey. 97, n. 6.)

Appointments.—Where a power of appointment is given, the donee of the power is enabled to convey by a single deed, and thus, whilst the stamp duties on a deed of bargain and sale for a year were in existence, the expenses of that stamp might have been avoided, on which account, in small purchases and mortgages, a conveyance by way of appointment was frequently resorted to for that express purpose.

Disadvantages attending an assurance by way of appointment.—The disadvantages attending a conveyance by way of appointment are, that the conveyance may be endangered on account of the deed of appointment not being made and executed in strict conformity with the terms of the power; and, secondly, that it is at least doubtful whether the covenants for title entered into with a vendor will run with the land. A little care and attention on the part of the purchaser's solicitor can easily obviate the first disadvantage, but the second is not so easily disposed of. The reason assigned for the covenants not running with the land is, that the purchaser coming in under the deed creating the power, and not under the party exercising it, the former claims by a title paramount to, and independently of, the latter, and therefore, for want of privity of estate, the appointee cannot claim the benefit of covenants entered into with the donee of the power: (*Roach v. Wadham*, 6 East, 249.) Since the

statute 13 & 14 Vict. c. 97, has dispensed with the necessity of a lease for a year, or the payment of any stamp duty in respect of the same, and as a simple deed of grant and release possesses some advantages over a simple deed of appointment, it is apprehended that the latter mode of assurance will rarely be resorted to as a mode of conveyance from vendor to purchaser.

Grant and release.—A deed of grant and release is now the usual conveyance from a vendor to a purchaser, because it has all the effect of an assurance by way of lease and release, without requiring to be either preceded by the lease for a year, or being burdened with the stamp duties formerly required upon instruments in themselves capable of passing freehold property without such lease for a year being employed,—as feoffments or deeds of bargain and sale enrolled, and appointments in exercise of powers.

Lease for a year, when first dispensed with.—The necessity for a lease for a year, to form the groundwork of an effectual release, was first dispensed with by the statute 4 & 5 Vict. c. 21, by which a release was rendered as effectual for the conveyance of freehold estates, as a lease and release by the same parties; but, in order to make it so, it was essential that the deed of release should be expressed to be made in pursuance of the act, and the deed of release was still charged with the additional duty to which it would have been liable, if the lease for a year had been actually employed.

Operation of enactments upon conveyances of real property.—Another enactment was subsequently made (7 & 8 Vict. c. 76) for the specified purpose of simplifying the transfer of property, but which was soon discovered to be so inadequate for the intended purpose, that it was repealed by an act passed in the next session (8 & 9 Vict. c. 136). By this last-mentioned statute, all corporeal tenements and hereditaments are declared, as far as regards the conveyance of the immediate freehold thereof, to be deemed to be in grant as well as in livery (sect. 2), by which means freehold corporeal hereditaments are capable of being conveyed by a simple deed of grant only, which will now be as effectual an instrument for the purpose as any other mode of assurance that could possibly have been adopted, although deeds of grants, prior to this enactment, were only calculated to pass incorporeal hereditaments, such as tithes, rent charges,

advowsons, or easements, and other privileges arising out of real property, as rights of way, the use of lights, water-courses, or the like.

As to conveyances under statute 8 & 9 Vict. c. 119.—By another act passed in the same session (8 & 9 Vict. c. 119), it is directed that, whenever a party to any deed made according to the forms set forth in the first schedule to that act, or to any other deed which shall be expressed to be made in pursuance of it, or referring thereto, shall employ in any such deed respectively any of the forms of words contained in column 1 of the second schedule thereto annexed, and distinguished by any number therein, such deed shall be construed as if such party had inserted in such deed the form of words contained in column 2 in the same schedule, and distinguished by the same number as is annexed to the form of words employed by such party; but that it should not be necessary in any such deed to insert any such number: (sect. 1.) It also enacts, that unless there was a special exception of the same, the deed should include the usual general words, “all houses, &c.,” and the reversion, &c., and all the estate, &c. This act does not, however, seem to have met with the approbation of the profession, and as its fifth section provides that a deed not taking effect under this act shall be as valid as if the act had not been made, the profession have generally, if not universally, availed themselves of the saving clause by rejecting the whole of the scheduled forms annexed to the act, and employing the same forms as before, which, from the view Mr. Browell seems to have taken in his comment upon the act, was the best course they could, under the circumstances, have possibly adopted: (see Browell's Real Property Statutes, p. 283, n.) But whatever alterations in the law were made by these statutes, all of them retained the stamp duties chargeable on the lease for a year, which remained until the passing of the statute 13 & 14 Vict. c. 97, by which at length these duties were finally abolished: (sect. 6.)

Exchange.—An exchange at common law is a mutual grant of equal interests, the one being given in consideration of the other (Shep. Touch. 16; 2 Bla. Com. 323); it can only be made between two parties, although the number of persons of which the parties consist is immaterial: (3 Wils. 483.) The foundation of the assurance is a mutuality of interest; and out of this arose an implied warranty which engendered the right of entry in case of eviction. An

assurance of this kind was perfected by an actual entry of the party, which was essential to its operation, so that if either died before such entry was made, the exchange became inoperative: (see Butl. note to Co. Litt. 276.)

Implied warranty done away with by recent enactments.—The implied warranty arising out of an exchange at common law has, however, been destroyed by the statute 8 & 9 Vict. c. 106, which enacts that an exchange, made after the 1st of October, 1845, of any tenements or hereditaments, shall not imply any condition in law (sect. 4); but as this statute still leaves the equitable doctrine untouched, by which, after mutual conveyances, one estate may be rendered liable to the incumbrances of the other, a greater degree of practical inconvenience arises out of this equity than any which formerly existed from the pre-existing form of the exchange, which, as a mode of assurance, had in fact become nearly obsolete: (Browell's Real Property Statutes, 276.)

Deed not formerly necessary upon an exchange.—It was not formerly necessary that an exchange should have been made by deed, unless the subject-matter of it lay in grant, or was situate in different counties; in other cases a mere note in writing would have been sufficient (Co. Litt. 50, 51), but now the statute of 8 & 9 Vict. c. 106, enacts that an exchange of any tenements or hereditaments, not being copyholds, made after the 31st day of October, 1845, shall be void at law unless made by deed: (sect. 2.)

Modern modes of assurance for effecting an exchange.—But although an exchange is now rarely employed as a mode of assurance, the same object has been sometimes effected by means of mutual releases, the one being expressed to be made in consideration of the other, instead of making each a pecuniary consideration for the whole value: (see the form 1 Con. Prec., Part II., Section I., No. XLII., p. 223.)

2. As to Disentailing Assurances.

As to fines and recoveries.—Estates tail were formerly barred by means of fines and recoveries. But both these modes of assurance have been abolished by the statute 3 & 4 Will. 4, c. 74, and more simple assurances substituted in their stead.

Usual purposes for which fines and recoveries were employed.—The chief object for which fines and recoveries were employed were for the purpose of barring entails, and permitting married women to consent to the alienation of their estates and interests in real property; both of which objects can now be effected at much less trouble and expense by the substituted assurances under the last-mentioned act.

Assurance now used for barring entails.—The instrument now employed for the purpose of barring an entail is a deed enrolled; but the act does not require any particular mode of assurance to be adopted; all it requires is, that the instrument shall be a deed, and that such deed shall be enrolled within six calendar months after execution; but such deed need not be an indenture, so that any instrument capable of conveying real property from one party to another may be employed for the purpose. Still, for all this, some kinds of conveyance are not so well suited to accomplish the ends for which the assurance was made, as others. Thus, for example, where the disentailed property is intended to be limited to dower uses, or any uses are intended to arise out of the seisin of the party to whom such property is to be conveyed for the purpose of barring the entail, a deed of bargain and sale would be an improper instrument, for though effectual as far as barring the entail is concerned, it would vest the use in the bargainee, so that all limitations to arise out of his seisin would be mere equitable estates; added to which, a question has arisen as to whether, if a disentailing deed by bargain and sale goes beyond the mere purpose of effecting a sale or mortgage, as where it is made for the purpose of re-settling an estate, or converting the entail into an estate in fee simple, a 5*l.* stamp will not become necessary, under the provisions of the General Stamp Act, 55 Geo. 3, c. 184, Sched., Part I., by which a bargain and sale (to be enrolled) of any estate of freehold in lands in England, upon any other occasion than a sale or mortgage thereof, is charged with a stamp duty of the above-mentioned amount.

Best modern mode of assurance for barring entails.—The best kind of instrument that can now be employed is a conveyance by simple grant and release, in which the words "bargain, sell," should always be left out, so as to prevent the possibility of any question arising as to whether or not the enrolment would cause the deed to operate as a bargain and sale, which it cannot do if its operative words are alto-

gether omitted: (see the form 1 Con. Prec., Part III., Sect. III., No. I., p. 327, 2nd edit.)

How disentailing assurances are arranged when connected with conveyances to purchasers.—In conveyances to purchasers, the disentailing assurance and conveyance to the purchaser are often contained in the same deed (see the form 1 Con. Prec., Part III., Sect. III., No. II., p. 336, 2nd edit); but it sometimes happens that a vendor of entailed property sells a portion of it, and, being obliged to execute a disentailing deed for the purpose of making a title to that part of his property, is at the same time desirous of barring the entail in the residue which he retains. Whenever this occurs, it will be necessary to bar the entail by a distinct deed from that by which the property is conveyed to the purchaser.

Cost of disentailing assurances defrayed by vendor.—The costs of the disentailing assurance must be defrayed by the vendor, and even when such assurance is effected by the purchase deed, the vendor should pay all expenses incurred on account of the extra length of the instrument thereby occasioned, as well as the costs of enrolment of the deed. And if the conveyance is likely to run to any considerable length, it will be a saving of expense to bar the entail by a distinct deed, even where the whole of the entailed property is to be conveyed to a purchaser, as the entire conveyance must be enrolled, and this at the expense of the vendor, as forming one of the essentials for perfecting his title; the costs for which are at the rate of 6*d.* per folio of seventy-two words.

Purchaser's right to have disentailing assurance by a distinct instrument.—It seems, also, that a purchaser from a tenant in tail has a right to insist upon the entail being barred by an assurance distinct from the purchase deed; for he has a fair right to object to any unnecessary exposure of his title in a public office; and if he refuses, purchaser's solicitor has a just right to insist that such legal estate should be gotten in by a distinct deed.

As to statutory forms of conveyances under railway acts.—Several of the railway, and other similar acts, as also the Lands Clauses Consolidation Act, 1845, have statutory forms of conveyance annexed to them, but as the use of these forms is not compulsory, a preference has generally been

given to the ordinary modes of assurance for conveying lands to any of the companies embodied or authorized by such several acts.

3. *As to Leasehold Estates.*

*Usual mode of assurance for passing leasehold estates.]—*The usual mode of passing leasehold estates for years absolute or for years determinable on lives, is a deed of assignment of the whole term; at the same time, it not unfrequently happens that the assurance is made by way of demise or underlease, by which nearly the whole of the term is granted, reserving only a small reversion, as the last week or a single day thereof, a subject we shall enter upon more fully when we come to treat of the completion of purchases of leasehold property. If the lease is held for lives only, then it becomes a freehold interest, and is conveyed by the same modes of assurance as other kinds of freehold property.

4. *As to Copyhold or Customary Estates.*

The legal estate of copyholds passes by entry on the court rolls; in addition to which there is usually a deed declaring the uses of the surrender, a subject we shall enter into more fully when treating of assurances relating to copyhold or customary estates.

II. PRACTICAL DIRECTIONS FOR PREPARING THE CONVEYANCE OF FREEHOLD PROPERTY.

1. As to the instrument of conveyance.
2. Parties.
3. Recitals.
4. Testatum and granting clause.
5. Parcels and general words.
6. Exceptions.
7. Of the habendum clause.
8. Limitation of uses.
9. Covenants.
10. Examination of the deed with draft.
11. Of the execution and attestation.
12. Payment of purchase money.

1. *As to the Instrument of Conveyance.*

*As to the indenture of the deed.]—*In former times, when deeds were more concisely drawn than at the present day, it

was the common practice to write both parts on the same piece of parchment, with some letters of the alphabet written between them, through which the parchment was cut, either in a straight, or an indented line, so as to leave some portion of the letters on one part, and some on the other; but the practice for many years past has been merely to cut the top of the parchment in a waving line, without cutting through any letters at all, the alphabetical part of the affair being altogether dispensed with, and the indentation itself serving no other purpose than to give the title of indenture to the instrument. It was not necessary that the deed should have been indented at the time of its delivery, for this might have been done at any time afterwards; but, until done, it was not considered as an indenture, or allowed to operate as such. The statute (7 & 8 Vict. c. 76), however, did away with the necessity of indenting a deed, and did not even require that an instrument, to have the operation of an indenture, should be so styled at its commencement. But this enactment was repealed by the subsequent statute (8 & 9 Vict. c. 106), under which indentures have regained their long established name, with the additional advantage, that no actual indentation is now essential to confer it, so that an instrument, which sets out with describing itself as "THIS INDENTURE," whether indented or not, will still form a perfect instrument under that appellation.

Not essential that a conveyance should be by indenture.—But it is not necessary that a conveyance should be an indenture, for lands may be conveyed by deed poll as well as by deed indented; still a preference is almost universally given to a conveyance by indenture, as being a more powerful instrument than a deed poll, as all the parts of an indenture form but one deed, so that every part is of as great force as all the parts put together working by estoppel, and barring and concluding every party executing it (Shep. Touch. 50; Plow. 134, 421, 434; 26 Hen. 6. cc. 24, 25; Litt. s. 370; 6 Hen. 6, c. 35; 35 Hen. 6, c. 34), whereas a deed poll is of one part only, and expounded as the sole deed of the person making it, and the words therein contained, being binding on him only, cannot create an estoppel in point of estate: (Shep Touch. 53.)

As to the date of conveyances.—Every modern deed of conveyance commences with the date, but this is not

essential to its validity, as it will be equally good without any date at all, or an impossible date, as the 30th day of February, or the like, if the time of delivery is proved; for a deed takes effect, not from the day on which it purports to bear date, but from the time of its delivery: (6 Co. Litt. 46; Dy. 38; 2 Bla. Com. 304.) A deed executed on a Sunday will be quite as valid as if it had been executed on any other day of the week, as the statute (29 Car. 2, c. 7) for the better observance of the Lord's day, applies only to process and other proceedings of the courts, and dealing in the course of trade, but has nothing whatever to do with the private transactions of individuals between themselves by way of conveyance.

2. Parties.

Of the names and description of parties.—The parties to a deed should be described by their proper christian and surnames, places of abode, and respective titles or occupations in life, or, in the case of corporate bodies, by the name of incorporation. Sometimes it will be proper to state the particular situation or characters which the parties fill; as “trustees, executors, heir-at-law,” &c.

Order in which the parties should be placed in the deed.—The correct way of arranging the parties to a deed is to place the granting parties first, and amongst these the persons possessing legal estates must have the priority, next those taking equitable or beneficial estates or interests in the property; after them the parties to whom the legal estate is to be conveyed, and then those who are to take equitable estates, if they are made parties to the deed; but frequently persons who take under declarations of trust are not named as parties in the premises the deed by which such trusts are created.

Order in which the granting parties should be placed.—When the granting parties take several estates and interests in the property, they should be arranged accordingly. Husband and wife are usually coupled together, as John Smith, of, &c., and Ann his wife; as are also persons taking joint estates or interests, as joint tenants, trustees, or executors. Where both freehold and chattel-interests are intended to pass, the parties taking freehold estates, whether legal or equitable, come first; then the persons possessing chattel interests. Thus, for example, suppose a conveyance by the heir and executor of a deceased mortgagee, with the

concurrence of the owner of the equity of redemption to a purchaser to uses to bar dower. In this case, the heir of the deceased mortgagee should be the party of the first part; the owner of the equity of redemption of the second part; the deceased mortgagee's personal representatives, whether executors or administrators, of the third part; the purchaser of the fourth part; and the purchaser's dower trustee of the fifth part: (see the form 1 Con. Prec., Part II., Sect. I., clause 1, p. 123, 2nd edit.)

Error in arranging the order of the parties will not affect the validity of the deed.—But any error in the order of arrangement of the parties at the commencement of the deed will not affect its validity in the slightest degree; neither will even the omission of the name of any of the grantees in this part of the deed prevent them from taking under it. Formerly, indeed, a stricter rule prevailed, which was, that no one can grant by deed, or take an immediate estate under it, without being named as a party in the premises of the instrument; but this did not extend to persons taking by way of use, or to mere equitable or trust estates, or to estates that were not to take effect immediately as estates in reversion: (*Samme's case*, 13 Rep. 55; *Gilby v. Copley*, 3 Lev. 138.) But now, under the statute (8 & 9 Vict. c. 106) parties, although not named as parties in the premises of a deed, may take immediately under it, in whatever way the property may be limited to them: (sect. 5.)

Persons sometimes made parties whose concurrence is not essential.—Persons are often made parties to a deed whose concurrence is not essential, either to give force to the assurance, or to confer any greater security or indemnity to the purchaser than he would otherwise acquire. This often occurs where lands have been devised to trustees upon trust to pay debts and legacies, when the heir and legatees are often, and the creditors sometimes, made parties to the conveyance to the purchaser, although they are not actually essential parties: (*Elliott v. Merryman*, Barnardist. 78; *Shaw v. Bonner*, 1 Kee. 599.) Because, unless the debts are either scheduled or specified, or the charges are particularized, whenever lands are devised to trustees for their payment, the receipts of the trustees, will be a sufficient indemnity to purchasers, and exonerate the latter from all responsibility with respect to the application of the purchase money, whether an express clause to that effect

be inserted in the will or otherwise: (*Cuthbert v. Baker*, 1 Cru. Dig. tit. xii., ch. 4, part 32.) But in the absence of this clause of indemnity, if the debts are specified or scheduled, or the charges created by the will are particularly set forth, then the creditors or parties entitled to the benefit of the charges under the will must either be made parties to the purchase deed, for the purpose of releasing their claims upon the property, or the purchaser will be bound to see that his purchase money is applied in discharge of such claims.

As to the concurrence of mortgagor where mortgagee sells under a power or trust for sale.—In case of the exercise of a power of sale by a mortgagee, under the ordinary powers of sale contained in mortgage deeds, the mortgagor is often made a conveying party. This concurrence was indeed at one time considered to be essential, it being doubted whether a mortgagee could effect a sale of this kind without the mortgagor's concurrence (see 1 Pow. Mort. 14); but these doubts have been long since removed, and the validity of the exercise of a power of sale by a mortgagee without the mortgagor's concurrence so firmly established, that it has been decided that a purchaser under a power of sale has no right to insist upon a mortgagor's being made a party to the conveyance, even where there is an express covenant on his part to concur in the sale (*Clay v. Sharp*, 18 Ves. 436; *Corder v. Morgan*, *ib.* 344); and it seems that if a purchaser should refuse a specific performance, without such concurrence, it would be decreed against him with costs: (Hughes Pract. Mort. 67.)

Concurrence of dower trustee not essential.—Neither is the concurrence of a dower trustee in any way necessary, his estate being nothing more than a remainder for the life of the vendor expectant on the forfeiture of his life estate, so that in modern practice the dower trustee is generally left out of the conveyance altogether.

Duties of vendor's solicitor where purchaser inserts unnecessary parties to the conveyance.—The reason of making persons parties to the conveyance, whose concurrence is not really essential, is not for the purpose of actually conveying anything, but rather as affording some recorded evidence of their knowledge of the nature, as well as concurrence and approval, of the transaction. This may certainly be satis-

factory to a purchaser's mind, but it entails some additional trouble as well as expense upon a vendor, especially where the conveying parties execute at different times, the costs of which fall upon the vendor, and where he can confer a marketable title without this superfluous addition of concurring parties, his solicitor should insist either upon having them expunged altogether from the deed, or else require that every additional expense thereby incurred shall be borne by the purchaser.

Contract stipulating that certain parties shall concur, although the parties are unnecessary.—But notwithstanding the general rule is that the vendor has a right to expunge all unnecessary parties from the conveyance, such rule will not prevail where it is specified in the contract that certain specified persons shall concur; for in such case the purchaser will have a right to insist upon their concurrence, which the vendor will not be allowed to refuse, on the ground that they are in fact unnecessary parties: (*Benson v. Lamb*, 9 Beav. 502.)

What persons really are essential parties to a purchase deed.—It will not be improper to offer here a few observations as to what persons under particular circumstances really are essential parties to a purchase deed.

Where vendor dies pending contract.—Where a vendor dies between the time of signing the contract and the completion of the purchase, his heir, and also personal representatives, must be parties, the former for the purpose of conveying the legal estate, which still remains vested in him; and the latter for the purpose of acknowledging the receipt of the purchase money, and releasing all claims in respect of the same: (see the form 1 Con. Prec., Part II., Sect. I., No. XXIX., p. 165, 2nd edit.)

Bankrupt.—A bankrupt is also made a party to the conveyance of his estate, to obviate any difficulty which may arise to a purchaser at any future time, in maintaining or proving the title (see the form 1 Con. Prec., Part II., No. XXVII., p. 152, 2nd edit.), and the Bankrupt Act (6 Geo. 4, c. 16, s. 28) empowered the Lord Chancellor, upon petition, either by the assignees, or a purchaser, to direct the bankrupt to join in the conveyance, and in case of his refusal, the order of the court was to have the same effect as if he had actually

concurrent. And by the statute (12 & 13 Vict. c. 106), which repeals the statute (6 Geo. 4, c. 16), the court, upon application of the assignees, or of any purchaser from them of any part of the bankrupt's estate, if such bankrupt shall not try the validity of the adjudication, or if there shall have been a verdict at law establishing the validity, may order the bankrupt to join in any conveyance of such estate, or any part thereof, and if he shall not execute such conveyance within the time directed by such order, such bankrupt, and all persons claiming under him, shall be estopped from objecting to the validity of such conveyance: and all estate, right, or title which such bankrupt had therein shall be as effectually barred by such order, as if such conveyance had been executed by him: (sect. 148.)

Where the consent of a person is necessary to the sale, he must be made a party.—Where, by the terms of a power, or of a trust, or under the provisions of any act of Parliament, the consent of any particular person is required, that person should be made a concurring party to the conveyance.

As to entailed property.—Where entailed property to which there is a protector is sold with his consent, he should be either a party to the conveyance to the purchaser, or to the disentailing deed; for, notwithstanding the Fine and Recovery Substitution Act (3 & 4 Will. 4, c. 74) does not render it necessary that his consent should be given by his concurrence in the disentailing deed, as he is also empowered to do by a distinct instrument, provided that instrument be a deed and executed either on or at any time before the day on which the disentailing assurance shall be made (sect. 42); still there is an advantage in making the protector a party to the disentailing deed, for the purpose of preventing any questions from arising at a future time, as to whether in fact, a prospective or retrospective consent was given.

Necessary parties in conveyance of an equity of redemption.—Where an equity of redemption is sold, the mortgagee is sometimes made a party, and enters into a covenant for the production of the title deeds; still this must be purely a voluntary act on the part of the mortgagee, which neither vendor nor purchaser can require him to perform. But if, in accordance with the usual practice, the mortgagee is not made a party, he ought to have express notice of the purchase, and this the purchaser's solicitor should take care to furnish him with; otherwise, if the mortgagee was to

advance any further sum to the mortgagor, without having had either express or implied notice of the purchase, such further advance would be an effectual further charge upon the purchased property to precisely the same extent as if no sale and conveyance of the equity of redemption had ever taken place: (*Shepherd v. Tiley*, 2 Atk. 348.)

Distinction between trustees, executors, and administrators, concurring parties to a conveyance.]—Trustees and administrators have a joint power and authority which they cannot exercise separately, and therefore they must all be made concurring parties, whenever they have any estate or interest to convey or to release to a purchaser (*Hudson v. Hudson*, 1 Atk. 460); but it is otherwise with respect to executors, as these take both a joint and several interest in the testator's personal estate, so that a disposition of any one of them is binding upon the rest: (Dy. 33; 1 Eq. Ca. Abr. 319.)

As to power of disposition by administrators.]—But although administrators must all concur in passing or releasing any interest taken in their representative character, they have as absolute a power of disposition as if they had been appointed executors, with this difference, that all the administrators must concur in making it, which is not, as we have just before noticed, essential in the case of executors; and this power extends to all the testator's goods, chattels, and effects, whether real or personal; so that a person purchasing from them is not bound to see to the application of his purchase money, even if the term is charged with particularized debts, or the term itself is specifically bequeathed; because all the testator's personal estate is subject, in the first instance, to the payment of his debts, and, therefore, his personal representatives may assign all the property so sold to any person or persons who shall agree to purchase the same, the latter of whom are entirely exonerated from seeing to the application of the purchase money: (*Ever v. Corbet*, 1 P. Wms. 148; *Andrew v. Wrigley*, 4 B. & C. 125.) And in a recent case, where an action was brought to recover the amount of the deposit on the purchase of a leasehold estate, upon the ground that the vendor, an executor, could not make title, because, at the time of the sale, a creditor's suit was pending against the vendor, of which the purchaser had no notice at the time of delivering the abstract, the court held this not to be an objection to the title, because the executors have a power of

sale at any time before a decree in the suit that is pending : (*Neeves v. Burrage*, 14 L. T. Rep. 394.)

3. *Of the Recitals.*

Recitals depend upon state of title.]—The recitals always depend upon the particular state of the title, and the estates and interests the granting parties take in the property; consequently it is impossible to lay down any precise rules upon the subject. The proper course to adopt is to avoid loading the conveyance with unnecessary, or even lengthy, recitals, taking care at the same time not to leave out the recital of any deed or other instrument, or of any fact that is necessary to show the true state of the title up to the time at which the conveyance is to be executed; as also the relationship in which the several conveying parties stand to each other with respect to the purchased property.

Recitals not essential where purchaser is to have the title deeds.]—If the title deeds and other documents of title that are to be delivered over to the purchaser are of themselves sufficient to enable him to defend his title, no recitals are essential to his security, and under such circumstances the recitals may either be short, or they may be omitted altogether; but when the title deeds are not to be delivered over to the purchaser, or the documents delivered over do not of themselves disclose the whole facts and circumstances of the title, all those facts and circumstances not so disclosed should be set out in the conveyance.

When a party conveys by appointment, the instrument creating the power ought to be recited.]—Whenever any of the parties convey under a power of appointment, or the operation of the purchase deed is derived from some other instrument, the latter instrument should always be recited; hence, where a vendor conveys by way of appointment, the instrument by which the power was created should always be recited (see the forms 1 Con. Prec., clause 2, p. 43, 2nd edit.; *ib.* clause 2, p. 52); but this need not always be done in that part of the deed in which the recitals are usually inserted, for where brevity is desirable, it may be recited in the testatum clause; as, for example,—

The said A. B., in consideration, &c., in exercise of a power limited to him by a certain indenture dated, &c. (*setting out also the names of parties*), doth by this present deed appoint, &c.

How instruments creating powers should be recited.—In the recital of powers, it is unnecessary to recite more than will be sufficient to show that the intended exercise of the power is warranted by it, and therefore it will be superfluous to set out recitals of any of the uses which are limited to take effect in default of appointment; it will be sufficient merely to state—

And in default of such appointment, to certain uses [or, upon certain trusts, *as the case may be*] as in the now reciting indenture [will, or other instrument, according to circumstances] are limited and declared.

How a joint power of appointment should be recited.]—If a joint power of appointment has been limited to two or more persons, which is extended also to the survivors or survivor upon the death of either of the donees without having exercised it, and after the death of either of them the survivors or survivor are desirous of exercising the power, it will be proper not only to recite the creation of the power, but also the fact of the death of the deceased donee or donees, by means of which the power became vested in the survivors or survivor, and that no joint appointment was ever made.

As to recitals where vendor is seised simply in fee, and when the property has been conveyed to him to dower uses.]—Where a vendor is seised simply in fee, it will be sufficient merely to recite that fact, or to omit recitals altogether; but where the property has been limited to him to dower uses, then that conveyance ought to be recited, but this may be done very briefly: (see the form 1 Con. Prec., Part II., Section I., No. II., clause 2, p. 52, 2nd edit.)

What recitals are necessary when there are outstanding legal estates.]—Whenever there are any outstanding legal estates, or the property is subject to a mortgage or any other incumbrance, it will be necessary to show by the recitals how those estates or incumbrances are created, and the relation in which the conveying parties stand to each other respecting them.

Where the trustees are conveying parties.]—In conveyances of trust property, if there is a power for the trustees to give receipts, such power should be recited, but it will be superfluous to recite the trusts of the purchase money: (see the form 1 Con. Prec., Part II., Section I., No. V., clause 2, p. 60, 2nd edit.) But where the trustees are not invested with such power, and the purchasers are not, from the nature of the trust, exonerated from seeing to the applica-

tion of the purchase money, it will then become requisite to recite the trusts, and to make the parties beneficially interested in the purchase moneys parties to the conveyance for the purpose of releasing their claims upon the property. And, in all cases where trustees convey, it will be proper to recite so much of the instrument creating the trust as will disclose their authority to make an effectual conveyance to the purchaser.

Consent of parties when necessary must be sealed.—So, where trustees are only authorized to exercise the trusts or powers of sale with the consent of some particular person or persons, the manner in which such consent is to be given, and that such consent has been given accordingly, must also be recited: (see the form 1 Con. Prec., Part II., Section I., No. VIII., clauses 2 and 3, p. 70, 2nd edit.)

Of the order in which the recitals should be introduced into the purchase deed.—As a general rule, the different documents should be recited according to the priority of their respective dates, and all facts and transactions according to the priority of time at which they respectively occurred. But where several distinct transactions are to be stated, one independently of the other, it is generally better to go through the recital of the whole of one entire transaction before entering at all upon the recital of the other.

When deeds should be recited as principal, and when as recited, deeds.—If the party has the original deeds, and can depend upon the recitals of them, it is better to recite them as such; but if he neither has the originals, nor can depend upon the recitals, they should be recited as recited deeds.

Distinction between a recited instrument and its effect.—It must also be borne in mind, that there is a distinction between the recital of an instrument, and the recital of its effect and operation; in the former instance the language of the instrument should be strictly adhered to, in the latter it may generally be varied. Still there are some assurances that, from their very nature, require to be formally recited, and not merely their results stated. Thus, where the instrument in recital is a conveyance to uses to bar dower, it is inaccurate merely to state that the property was conveyed to the usual uses to bar dower, because various forms have been, and still are, employed for this purpose, particularly as to the mode of executing the power of appointment, and

no one, from such general expressions, could possibly ascertain what the exact uses were. But where the direct result of a former instrument is of one or more simple fact or facts, which contain within themselves all their own consequences, without looking further into the language of such instrument, it may then be sufficient to state the result without setting out the expressions by which it was effected; as, for example, where a man is seised in fee, it will be enough to state that fact, without stating how he became so entitled: (see Conveyancer's Recital Book, p. 37.)

When it will be better to recite the effect created by the terms employed, than the express words themselves.]—When, as frequently occurs in the case of a will, the strict technical words have not been used to create the estate that has actually passed by them, it will be a preferable plan to state the result, and not the exact expressions by which that result was effected. Hence, where a testator has devised lands to A. for life, with remainder to his first and other sons in tail, in words sufficient to create those estates, and yet not in the strict technical terms usually employed for that purpose, it will be better to state the result than to insert the actual expressions of the devise; and this is most important to a purchaser claiming under the deed, where the words of the will can possibly be construed to bear a doubtful or equivocal import; for then, if the result of their supposed construction is recited, all parties who execute the deed will be thereby estopped from denying the estate to have been devised in any other manner than is set forth in the recital; whereas, if the exact words had been there stated, the parties would have been equally estopped from denying the legal import and operation of such words: (*Rountree v. Jacob*, 2 Taunt. 141; *Baker v. Dewey*, 1 B. & C. 704.)

Recitals no estoppel except as between the parties to the deed.]—It must be recollected, however, that recitals, although operating by way of estoppel on every person who executes the deed, and his representatives (*Doe v. Sherlock*, 1 Fox & Smith, 78; *Doe v. Saunder*, *ib.* 78), will not have this operation with regard to other persons; still, where the recited statements have been supported by long uninterrupted possession, and relate to facts which are within the knowledge of the parties, especially if those facts are stated with the circumstance of time, place, &c., they may often be relied on, although it is impossible to lay down any general

rule by which such reliance may be guided: (see 3 Prest. Abs. 8.)

As to recitals for the purpose of identifying the parcels.— Sometimes the recitals in previous deeds are inserted for the purpose of identifying the parcels, and the course through which they have been transmitted. This is often the means of disclosing facts which are not apparent from the title deeds themselves; as in the instance of property descending from ancestor to heir. This, however, may often be done by superadding a short form of recital to the description of the parcels; as,—

All which said hereditaments and premises were formerly the estate and inheritance of A. B., who died intestate, and thereupon descended from him to R. B., his nephew and heir-at-law, who devised the same to C. D., &c.

Or,

All which said hereditaments, &c., were formerly the inheritance of A. B., to whom the same premises were conveyed by indentures of lease and release, dated respectively the and days of , and made between (*inserting names of parties*) and the said A. B. by indentures of lease and release, dated, &c., and made between, &c., conveyed the same, &c.

As to the date of recited instrument.—It is a usual practice, in reciting the date of a deed, to state that it is made on or about the date which it is recited to bear, in order to guard against any error as to the particular day referred to, but this is an unnecessary precaution. It is also very common to state the recited instrument as made, “or expressed to be made,” between the several parties. This, Mr. Coventry treats as a most absurd practice, conceiving that those expressions imply that a deed can be made by other persons than those named in it. But Mr. Jarman takes the correct view of those terms, observing that the words “expressed to be made” are obviously designed to provide against the possible event of the recited deed not being executed by all the persons who are professed parties to it; in which case their insertion is essential to strict accuracy, since an instrument cannot be correctly described to be made by a person who in point of fact does not execute it. Hence those expressions would be proper where, as often happens, a dower trustee has been made a party, but who, from the unimportance of his concurrence, has never been called upon to execute the deed. They would also be particularly applicable where any of the parties named in the deed

refuse to execute it, as in those cases where a trustee disclaims the trust estate intended to be vested in him. In a case of the latter kind, the deed of disclaimer reciting the trust should state it as a deed expressed to have been made between the intended grantors and the trustee who refuses the acceptance of the estate intended to be invested in him.

As to the recital of lease for a year.—In conveyances by lease and release, it was always usual to recite the lease for a year. This was commonly done at the end of the granting clause, but was sometimes inserted at the end of the description of the parcels. This recital, although not absolutely necessary, was so far important that, if the lease for a year was lost, it often afforded satisfactory proof that such lease was actually made, and the release properly founded upon it: (*Skipwith v. Shirley*, 11 Ves. 64; *Ward v. Garmons*, *ib.* 134.) In Ireland it has been held sufficient simply to recite the lease for a year, no actual lease being ever made in conveyances by lease and release in that country (9 Geo. 2, c. 5; 1 Geo. 3, c. 3); and the statute 4 & 5 Vict. c. 21, which dispensing with the lease for a year, enacts that the recital or mention of a lease for a year in a release executed before the passing of that act shall be evidence of the execution of such lease for a year.

As to assignments of leasehold property.—In the case of assignments of leasehold property held for a term of years, it is usual to recite the deed creating the term, but where there have been several assignments, it is usual to omit the recitals of the mesne assignments, reciting only the last assignment to the assigning parties to the deed: (see the form 1 Con. Prec., Part II., Section II., No. V., clause 2, p. 262, 2nd edit.)

Unusual or burdensome covenants in leases should always be recited.—Where the lease contains any unusual or burdensome covenants; as, not to assign without licence, or not to carry on certain trades on the demised premises, &c., they should be set out in the recitals: (see the forms 1 Con. Prec., Part II., Section II., No. II., clause 2, p. 249, 2nd edit.; *Id. ib.* A., *in notis.*)

As to copyholds.—In copyhold assurances it is usual to recite the admission of the vendor, or whoever else is the tenant, to the copyhold premises: (see the form 1 Con. Prec., Part II., Section III., No. I., clause 2, p. 301.)

4. *Testatum and Granting Clause.*

Contents of testatum and granting clause.—The testatum and granting clause contains a statement of the consideration of the conveyance, and the operative words by which the property is conveyed to the purchaser.

As to the consideration.—By the common law, no consideration was necessary to the validity of any conveyance, with the single exception of a deed of bargain and sale; still, whenever a pecuniary consideration was paid, it was always advisable to set it out in the deed, not only for the purpose of showing that it had been paid, but also to rebut the presumption of a resulting use or trust, as well as to disclose that it was not a mere voluntary conveyance, which, as against creditors and subsequent purchasers, would be a totally void instrument. Added to this, the Stamp Acts, under severe penalties, require the full consideration to be set out in the deed, so that it has long since become the universal practice to express the payment of the consideration money in the body of the deed, as well as in the memorandum indorsed.

Statement of payment of consideration money, how far conclusive.—The statement in the body of the deed, that the consideration money has been paid, is conclusive at law, on the ground that a party who executed a deed is estopped from saying that all the facts therein stated are not truly set forth, but the receipt indorsed has not this operation, because, not being under seal, it is incapable of working an estoppel: (*Lampon v. Corke*, 5 B. & Ald. 606; 1 Dow. & Ry. 211.) But in equity, neither the acknowledgment of the receipt of the purchase money in the body of the deed, or in the indorsed memorandum, will prevent a vendor from showing that the purchase money has not in reality been paid: (*Coppin v. Coppin*, 2 P. Wms. 284; *Mackreth v. Symons*, 15 Ves. 337; *Hughes v. Kearney*, 2 Sch. & Lef. 132; *Grant v. Shallis*, 2 Ves. & Bea. 396; 2 Hughes Pract. Sales, 2nd edit.)

In disentailing assurances for the mere purpose of barring an entail, and where no pecuniary consideration is actually paid, it is not usual to set out even a nominal consideration, and this omission will always be proper whenever it is intended to resettle the property through the medium of the Statute of Uses, to prevent the possibility of a question arising as to the instrument when enrolled operating as a

deed of bargain and sale. In disentailing deeds, therefore, the proper way is to state merely that the assurance is for the purpose of barring all estates tail, &c.: (see the form 1 Con. Prec., Part III., Section IV., clause 2, p. 328, 2nd edit.)

How payment of consideration money should be expressed.]

—When an actual pecuniary consideration is paid, the receipt should be expressed rather more fully than where the consideration is merely nominal. Thus, where a conveyance is made by a vendor who receives the purchase money, and his trustee, who receives nothing, the testatum clause should state—

That in consideration of the sum of (*amount of purchase money*) sterling to the said (*vendor*) paid by the said (*purchaser*) on the execution hereof, the receipt of which the said (*vendor*) hereby acknowledges, and therefrom doth release and for ever discharge the said (*purchaser*), his heirs, executors, administrators and assigns; and also in consideration of the sum of five shillings, to the said (*trustee*), at the same time as aforesaid paid by the said (*purchaser*), the receipt of which is hereby acknowledged, &c.

Operative words.]—The usual operative words where the conveyance was by lease and release were “*grant, bargain, sell, alien, release, ratify, and confirm.*” The word “*grant*” in a conveyance of corporeal hereditaments was considered to apply peculiarly to the *estate* of the grantor, and the *reversion* of the land expectant on the determination of the bargain and sale for a year, or other existing particular estate, where there was no such privity between the grantor and the grantee as was requisite to give effect to the deed of release; as also to title deeds, rights of way, of common, and other incorporeal hereditaments as appurtenant to the land: (Shep. Touch. 238.) But as corporeal hereditaments are now made to lie in grant as well as in livery, the word “*grant*” will be strictly applicable to conveyances of every description of real property, whether corporeal or incorporeal, without the addition of any other operative words, and will now form an essential term in every conveyance, and ought to be inserted, as well in conveyances by trustees, or other parties taking dry legal estates, as by ordinary vendors who take a beneficial interest in the property. The practice in former times certainly was to advise trustees, and persons acting in that character, as executors, &c., not to convey by the word “*grant*,” upon the erroneous supposition that it raised an implied covenant in the granting party (Noy. Max. 261, 9th edit.; *Noke's*

Case, 4 Rep. 80; and see Butl. note to Co. Litt. 425), which notion, if it was ever well founded, has been completely nullified by the statute (8 & 9 Vict. c. 106), which expressly enacts that no implied covenant shall arise from either the word "give" or "grant;" consequently, a trustee has no longer any right to object to convey under either of those terms.

Object of inserting the words "bargain and sell" in a deed of release.—The words "*bargain and sell*" were used in a deed of release for the purpose of enabling the purchaser to give effect to the conveyance, as a bargain and sale by enrolment, should it be deemed expedient so to do by reason of the lease for a year having been omitted, or the like; but now, as a lease for a year is no longer necessary, the words "*bargain and sell*" may be both safely and properly dispensed with in an instrument of assurance, to which those terms are, strictly speaking, inapplicable.

As to the effect of the other usual operative words.—The term "*alien*" seems to have no other operation than to transfer the property from one person to another, and is far more frequently omitted than inserted in modern assurances, or rather seems to have given place to the word "*convey*," which seems a more apt and expressive term, and seems peculiarly adapted to conveyances by trustees, who are seised of dry legal estates, but take no beneficial interest whatever in the property. The word "*release*," which was peculiarly operative in the deed of release founded upon a lease for a year, is equally, if not more, effectual in assurances by way of release under the recent enactments (4 & 5 Vict. c. 21; 8 & 9 Vict. c. 106), and should always, therefore, be inserted. The expressions "*ratify and confirm*" are synonymous, and whenever brevity is desirable, the word "*confirm*" only is used. The object of its insertion was, in some cases, to give effect to the conveyance, where it would have failed of effect as an assurance by way of release, for want of privity between the releasor and releasee (Lit. 516), but where it is intended to operate as an enlargement of a preceding estate, the same privity is necessary to give effect to a confirmation, as to a release: (Wat. Conv. by Merifield, 549.) It may also be employed for the purpose of ratifying the acts of other conveying parties, or as an estoppel against parties whose estate in the property is now vested in the other granting parties; as where a bankrupt, or an insolvent debtor, concurs in a conveyance by his assignees, or the mort-

gagor concurs in a conveyance made by the mortgagee. It will also have the effect of making a voidable estate good; but it will have no operation upon an estate that is actually void: (Co. Litt. 295.)

Operative words depend upon the nature of the interest or claims to be conveyed or released.]—Where parties concur in a conveyance for the purpose of releasing or surrendering any interests or claims they may have in or upon the purchased property, the operative words employed for those purposes will depend upon the nature of such interests or claims. If any rights or claims are to be relinquished, the proper operative words are “*remise, release, and quit claim*,” although any one of those terms standing alone would have precisely the same force and operation; and where any lesser estate, as a lease or a term of years, is to be surrendered, the proper words are “*surrender and yield up*,” but the term “*assign*” would produce exactly the same effect: for whether a term of years is assigned or surrendered to the person entitled to the immediate reversion, the term will instantly become merged therein, and hence it is usual, when a term is intended to be so merged, to add the word “*assign*” to the other operative words by which such term is surrendered: (see the form 1 Con. Prec., Part II., Section I., No. XVII., clause 6, p. 106, 2nd edit.)

Operative words where the conveyance is by appointment.]—Where the conveyance is by appointment, the operative words are “*direct, limit, and appoint*,” or simply “*appoint*.” In conveyances both by appointment and release, the words appoint and release are sometimes joined together; yet this is always irregular, and sometimes materially wrong. If brevity is desirable, the object may be attained by including both the appointment and release in the same clause, and arranging them both in regular form, by stating that the vendor—

In exercise of the power limited to him by the said heretofore recited indenture, DORN by this present deed irrevocably appoint that the hereditaments and premises hereinafter described shall from henceforth be to the uses hereinafter declared, and, by way of further assurance, DORN, by these presents, grant, release and confirm unto the said (*pur-chaser*) and his heirs, ALL, &c.

But where brevity is not particularly required, the usual practice in conveyances by way of appointment and release is to have two testatum clauses. The first sets out the

consideration, and that the vendor, in exercise of his power of appointment, appoints that the property to be conveyed shall from thenceforth be to the uses thereafter declared. The second testatum then states that, for the considerations aforesaid, the vendor grants, releases and confirms, &c.: (see the forms 1 Con. Prec., Part II., Section I., No. I., clauses 4 and 5, p. 44, 2nd edit.)

Proper operative words in disentailing assurances.—In disentailing assurances, the proper operative words are “grant and release,” or “grant, release, and convey;” but for the reasons previously stated the words “*bargain and sell*” must always be omitted: (see the form 1 Con. Prec., Part III., No. I., clause 2, p. 331.)

Where there are several conveying parties.—Where there are several conveying parties, it is usual to state that they convey according to their respective estates and interest, For example, in the case of a conveyance by the heir and executors of a deceased mortgagee to a purchaser under a power of sale contained in the mortgage deed, it should be expressed, that in consideration of the purchase money setting out the amount paid by the purchaser to the executors, and of a nominal pecuniary consideration paid by such purchaser to the heir, the heir, in respect only of his legal estate, as heir-at-law of the mortgagee, should “*grant, release, and convey;*” and the executors should “*remise, release, and quit claim.*” If the owner of the equity of redemption concurs, he should “*grant, release, ratify, and confirm:*” (see the form 1 Con. Prec., Part II., Section I., No. XXXI., clause 7, p. 125, 2nd edit.)

Where both mortgagee and mortgagor are concurring parties.—In conveyances in which both mortgagee and mortgagor concur, the way in which the purchase money is apportioned between them should be correctly set out in the deed of conveyance, and it should also be stated that the payment so made by the purchaser to the mortgagee is made by the mortgagor's direction: (see the form 1 Con. Prec., Part II., Section I., No. XXXI., clause 7, pp. 124, 125.)

Qualified terms sometimes employed in conveyances by trustees.—In conveyances by trustees, it is a common practice to qualify their conveyance by using the expressions “*as such trustees as aforesaid,*” or “*according to their estates and interests as such trustees,*” &c., or some other similar

expressions (see the form 1 Con. Prec., Part II., No. V., clause 5, p. 61, 2nd edit.); but is by no means essential to the protection of a trustee who appears in that character on the very face of the conveyance, and who merely covenants that he has done no act to incumber the trust property.

Impropriety of speaking in the past tense in instruments having a present operation.—It was until lately the general practice, in conveyances by lease and release, to speak in the past as well as in the present tense, as *HATH* granted, &c., and by these presents, *DOTH* grant, &c. ; but this is incorrect, and not in accordance with the fact, as nothing has passed, or possibly can pass by an assurance of this kind until the actual delivery of the deed. This erroneous course of proceeding arose, and was perpetuated by adopting analogous expressions in a conveyance operating under the Statute of Uses, that were properly adapted to a feoffment, but from which they materially differ. A feoffment takes effect by the delivery of possession by livery of seisin, of which the deed of feoffment is the evidence, and therefore it is perfectly correct that this instrument should speak of an act previously done of which it is to form the record, and to state that the feoffor "*HATH granted and infeoffed*," and by the then present assurance, *DOTH confirm*, &c.; but this does not apply to a deed operating by transmutation of possession under the Statute of Uses which passes nothing until the execution of the deed ; and hence the impropriety of speaking in the past tense is apparent, as it states an act to have been already done, which could not by any possibility have been then performed.

As to the parties taking under the conveyance.—In the granting clause, the usual and correct mode is to convey the property direct to the purchaser, and when limited to dower uses, to limit the uses to arise out of his seisin (see the form 1 Con. Prec., Part II., Section I., No. I., clause 5, p. 44, 2nd edit); but no conveyance is made to the dower trustee in this part of the deed. But when the more antiquated, but now obsolete, form of making the dower trustee and purchaser take as joint tenants was used, then the conveyance was made to them both, and it was declared in the habendum clause that the estate of the trustee was in trust only for the vendor. Where any of the parties take by way of use or trust, then the grant must be made to the releasee to uses: (see the form 1 Con. Prec., Part II., Section I., No. XXXIX., clause 4, p. 212, 2nd edit.) It has long been the universal practice, in the conveyance of

estates in fee simple, when made to the party direct, or to a releasee to uses, that words of limitation should be annexed to the grant, although this is not actually essential where the deed contains an habendum clause, which, in point of law, is the proper part of the assurance for introducing the words of limitation; it being the office of the premises to name the grantee and describe the parcels, and of the habendum to limit the uses, or estates, which are to be taken under the deed.

How granting clause should be penned when purchaser himself is one of the conveying parties.—It sometimes happens that a person taking a partial interest only in the property becomes himself a purchaser of the remainder; as, where a mortgagee enters into an agreement with a mortgagor for the purchase of the equity of redemption; in which case, if he is desirous of having the property limited to uses to bar dower, which could not be properly limited out of a release of the equity of redemption made to him direct from the mortgagor, both mortgagor and mortgagee should concur in conveying the mortgaged premises to a trustee to uses, and the dower uses should be limited to arise out of his seisin: (see the form 1 Con. Prec., Part II., No. XXXIX., clauses 5 and 6, p. 212, 2nd edit.) In case, also, of one joint tenant purchasing the share of his companion in the tenancy, if he is to take such share merely in fee, then the conveyance should be by a simple release of such share from the one joint tenant to the other, but without any habendum clause (see the form 1 Con. Prec., Part II., No. IX., p. 72, 2nd edit.), which is the most correct mode in this species of assurance, as also in the surrender of estates for years, or other limited estates that are intended to become merged in the reversion. But where it is designed to prevent a right of dower from attaching on the property by the severance of the joint tenancy, it will then become necessary for both joint tenants to concur in the conveyance of the whole of the property to a trustee, to hold to him and his heirs to the uses to be limited to bar such right of dower: (see the form 1 Con. Prec., Part II., No. IX., A. *in notis*, p. 73, 2nd edit.)

As to disentailing assurances.—In disentailing deeds under the Fine and Recovery Substitution Act (3 & 4 Will. 4, c. 74), a conveyance may be made, with the protector's consent, without the latter parting with his interest, which the tenant to the præcipe, under the old system, was

disabled from doing. Hence, where the person taking the preceding life estate is the protector of the settlement, and is willing to concur in the conveyance by the next immediate tenant in tail, but is desirous at the same time to retain his own life interest in the property, the testatum clause should express that the tenant in tail, with the consent of the protector, as such protector as aforesaid, grants, &c.; yet the protector himself should neither grant, release, convey, or even confirm, but his name should be inserted as to the first party to the conveyance, which should be expressed to be made with his consent, and then his hand and seal being affixed to the deed will afford conclusive evidence of such consent, which is all that is essential to the assurance so far as the protector is concerned: (see the form 1 Con. Prec., Part III., Section IV., No. IV., clause 2, p. 339, 2nd edit.)

5. *Parcels and General Words.*

How the parcels should be set out and described.—The description of the parcels ought to be sufficiently comprehensive to take in every part of the property intended to be conveyed, and at the same time so restrictive as not to include any portion that may be intended to be reserved to the vendor.

At law, property will pass precisely as described.—At law no more will pass than is well described, and by the same legal rule all that is well described, and which the vendor has the power to convey, will pass: (2 Prest. Con. 447.)

Equity will rectify errors in description of parcels.—But courts of equity will rectify an error where any portion of the parcels have been by mistake omitted, or by decreeing a reconveyance where any more has been inserted in the conveyance than was actually the subject-matter of the contract (*Rob v. Butterwick*, 2 Pri. 190; *Thomas v. Davis*, 1 Dick. 301; *Young v. Young*, *ib.* 625; *Beaumont v. Bramley*, 1 Turn. 41); yet this is an equity that attaches only as between vendor and purchaser and their respective representatives, and does not extend to remainder-men, or to issue in tail, neither of whom would be compelled to rectify errors, or to supply omissions of this nature.

Description of parcels ought to correspond with that contained in former deeds.—The description of the parcels in
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the deed of conveyance ought to correspond with that contained in former deeds, and this always to such an extent as to show the identity of the lands throughout the title; unless where the property has been subdivided into parcels, when such a description must necessarily be improper. Whenever cases of this kind occur, Mr. Preston has suggested that the new description should be as simple as possible, and that the attention should be directed to select those circumstances of description which will distinguish the property from any other, and to take the most obvious circumstances of certainty as the foundation and groundwork of the description: thus, "all that messuage, tenement, and farm called, &c., situate, &c., which said hereditaments consist, &c., and were formerly the inheritance of, &c.:" (1 Prest. Con. 447.) The advantage of adopting this mode is, that the subsequent part of the description is independent of the former part of it, and therefore, though the subsequent circumstances of description may be erroneous, this error will not vitiate the grant, since that which is certain of itself cannot be destroyed by that which is uncertain, false, or insensible: (Bac. Max., Nos. 13 & 14; Shep. Touch. 246; *Doe v. Greathead*, 8 East, 91.)

Where the conveyance is by trustees or mortgagees.—Trustees or mortgagees sometimes object to convey the purchased property by any other description than that by which the same premises were conveyed to them, lest they should render themselves personally responsible for passing more property than actually became vested in them; but this apprehension seems groundless, particularly as qualifying words may be used so as to confine the lands in question to those originally conveyed to them.

Where distinct parcels are held under different titles.—It frequently happens that distinct parcels, held under different titles, are all included in one and the same deed. When such is the case, the parcels may be described in the order in which they occur in the recitals: as first, "all," &c., and then, after describing the parcels, may be added, "all which said hereditaments and premises are comprised in and described by the said hereinbefore recited indenture," &c.; secondly, "all," &c., referring in like manner to the recital relating to it, and so on through all the remaining parcels.

Mode of arrangement where the parcels are numerous.—But where the parcels are very numerous, the most neat and

accurate plan is to insert the parcels comprised in each class of deeds in a distinct schedule, and to make a reference from time to time in the recitals, and also in the grant, to the appropriate schedule. Thus the recital will be to this effect: "Whereas by indentures, &c., all, &c., which are described and comprised in the first schedule to these presents, with their appurtenances, were conveyed," &c. Or, when the circumstances require it, the recital may assume this form: "Whereas, by indenture bearing date, &c., divers hereditaments, and amongst them all those, &c., comprised in the first schedule to these presents, were conveyed," &c. The other recitals can be expressed in similar terms, adapting, of course, the recitals to the circumstances. The grant must be by words of reference to the schedules, and will be governed by the intention of the parties. In general it will be to the following effect: "All those messuages, &c., which are comprised and described in the first, second, third, and fourth sections hereunto annexed."

As to the arrangement of the general words where the parcels are set out in distinct schedules.—If the general words are added to each set of parcels set out in the several schedules, then the reference will be to the rights, members, and appurtenances by general words; thus, after the words "every part and parcel of the same," add, with the rights, members, and appurtenances; but when, as is the more frequent practice, the general words are not inserted in the schedule, they ought to be introduced into the body of the deed in the same form as if a full description of the parcels had been there inserted, instead of being set out in the schedules.

How parcels should be penned in cases where freehold and copyhold lands lie intermixed together.—Whenever freehold and copyhold or customary lands lie intermixed together, and both are the subject-matter of sale, care must be taken not to include the copyholds in the operative part of the grant, though instances often occur in which it is impossible to avoid doing this, from the inability to distinguish with accuracy what portions of the lands are actually freehold and what copyhold. It has been suggested that the best way of getting over this difficulty is to make the grant of all such and so many and such parts as are of freehold, and not of copyhold tenure, of and in all, &c., comprising a full description of all the parcels, including the freehold and copyhold lands, or inserting in such parcels a schedule annexed to the deed: (2 Prest. Con. 458.)

Parcels frequently set out in the recitals.—It is no uncommon practice to set out the description of the parcels in some of the recited deeds, and then merely to refer to them in the operative part of the deed, as all the aforesaid messuages, tenements, fields or closes, mentioned and described in the said hereinbefore recited indenture," &c. and then inserting the general words in the same way as if the full description had been inserted in the operative part of the deed. In appointments made in the exercise of powers, the parcels are usually described in the recital of the instrument creating the power, and merely referred to in the operative part of the appointment. In assignments of leasehold property also, the general practice is to describe the parcels in the recital of the original lease of the premises; and where the conveyance is made by trustees or mortgagees, the description of the parcels is often contained in the deed creating the trust or mortgage.

How property not intended to pass should be excluded.—When the parcels under a general denomination are calculated to pass more lands than are intended to be actually conveyed, it will be necessary to except those in express terms which are not intended to be included in the conveyance, a subject we shall shortly enter more fully into.

Of the general words.—After the description of the parcels are added the general words, the object of which is to cover anything omitted in the previous description of the property; but generally speaking, the word "appurtenances" will comprehend all that is included in the long string of words employed for that purpose.

As to conveyances on passing of statute 8 & 9 Vict. c. 119.—And by the statute (8 & 9 Vict. c. 119), where the words of column I. of the second schedule are employed, the deed is to have the same effect as if the words in column II. were inserted (sect. 1): and "every deed made in pursuance of that act, unless any exception be made therein, shall be held and construed to include all houses, outhouses, edifices, barns, stables, yards, gardens, orchards, commons, trees, woods, underwoods, mounds, fences, hedges, ditches, ways, waters, water courses, lights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and appurtenances whatsoever to the lands therein comprised, belonging or in any wise appertaining, or with the same demised, held, used,

occupied and enjoyed, and taken or known as part or parcel thereof, and also of the reversion or remainders, yearly and other rents, issues, and profits of the same lands, and of every part and parcel thereof; and all the estate, right, title and interest, inheritance, use, trust, property, profit, possession, claim and demand whatsoever, both at law and in equity of the grantor, of, in, to, out of, or upon the same lands, and every part and parcel thereof, with the appurtenances:" (sect. 2.) But conveyances under this act are very rarely resorted to in practice.

As to the reversion clause.]—The reversion clause alluded to in the above-mentioned act, was considered rather as a formal than an essential part of a conveyance, and is now more frequently omitted than inserted.

As to the all-estate clause.]—The all-estate clause, although still retained, is not a necessary part of the deed, and is in fact inapplicable to some assurances; as a feoffment, for instance, livery of seisin being made of the possession, and not of the estate of the feoffor. Neither is this clause applicable to those instruments where a particular estate only is intended to pass, or to those cases where the whole interest which the grantor has in the premises is not intended to pass; as where a person, seised in fee, grants a long term of years, or a person possessed of a long term grants an under lease, instead of assigning his whole term in the premises; still, although incorrect in point of form, it will not substantially affect the operation of the deed, as the effect it otherwise might have had is capable of being controlled by the habendum, which expresses the actual interest the grantee is really to take under it: (*Earl of Derby v. Taylor*, 1 East, 502.)

All-deeds clause.]—The concluding clause of the premises is the grant of all the title deeds and other documents of title to the purchaser. This clause is not, however, necessary to entitle the latter to have the documents of title delivered over to him on the completion of the contract, as they will pass to him otherwise, as incidental to his purchase, unless the vendor retains part of the estate, or has entered into qualified covenants for their production to a third person: (*Fild v. Yea*, 2 T. R. 608.) But whenever the documents of title relate solely to the property conveyed, immediately on the conveyance being executed, they become the property

of the purchaser, whether granted to him in express terms, or the deed, is altogether silent upon the matter, and the purchaser may maintain an action of trover for their recovery: (*Hooper v. Ramsbottom*, 1 Marsh, 414.) But it will be otherwise if the vendor retains any part of the lands to which such documents relate, for in the latter case the vendor will be entitled to retain them, unless he has by express terms granted them to the purchaser: (*Field v. Yea*, *supra*.) And according to the old authority, where a feoffor has entered into a general warranty, he would, it is said, be entitled to retain the deeds to enable him to defend the title he has thus warranted: (Co. Litt. 6.)

6. *Exceptions.*

The exceptions, if any, should come in after the description of the parcels, and general words. These arising out of the act, and being the words of the grantor, are always construed against him strictly (10 Rep. 106), and therefore require to be most carefully worded.

Requisites to support an exception.—In order to support an exception, it must be of such property as the party making the exception may lawfully retain: (Shep. Touch. 79; 12 Rep. 126.) It must not be of the whole of the thing granted, but of a part thereof only: (Cro. Eliz. 6, 244.) The thing excepted must be part of the thing previously granted, and not of some other thing: (Shep. Touch. 78, 79.) The thing excepted must be of such a thing as may be severed from the thing granted, and not form any of its inseparable incidents; as for instance, the courts baron, where a manor forms the subject matter of grant; or common appurtenant to the land granted: (Hob. 10; 11 Rep. 50a.) It must be a particular thing out of a general, or part of an entire thing, and not of a particular thing out of a particular thing; as, if one grants Blackacre and Whiteacre, except Whiteacre, as this would be an exception of the whole of the particular thing, whereas, as we have already noticed, an exception must be of part only, and not the whole of the thing granted. An exception must be in conformity, and not repugnant to, the grant (Hob. 72, 170), and the thing excepted must be described with as much certainty as if granted: (Shep. Touch. 78; *Wilson v. Armourer*, Lord Raym. 207; Wat. Con. by Merifield, 551.)

7. Of the *Habendum Clause*.

Habendum not actually an essential part of a deed.]—The habendum is a formal, but not essential part of a deed, for if it were to be omitted altogether, the deed would nevertheless be good. In some assurances, indeed, the habendum clause ought to be omitted, as in a deed of appointment in execution of a power, as also in all instruments operating by way of extinguishment, and not of enlargement, as in the case already noticed of the surrender of terms of years and other limited estates and interests which are designed to become merged in the reversion and inheritance of the premises out of which they are carved or derived.

When the habendum is repugnant to the granting clause, the latter will prevail.]—It is necessary that the granting and habendum clause should be in accordance with each other, but if there is any repugnance between them, the habendum will be rejected, and the grant will prevail; still, where the limitations are such that they may well stand together, and so that both may operate, they will not be considered as repugnant; as in the instance of a grant to a man and his heirs, habendum to him and the heirs of his body, in which case the grantor will take an estate tail, with a fee simple expectant thereon: (Co. Litt. 21 *a*; 5 Roll. Rep. 19; Cro. Jac. 476.) And as all grants are taken most strongly against the grantor, if he limit no estate at all by the granting clause, and an estate is limited by the *habendum*, the habendum will stand good: (Co. Litt. 138 *a*; 8 Rep. 154 *b*.) So, if a small estate, as an estate for life, be given in the granting part, and a larger estate, as an estate in fee, in the *habendum*, the habendum will prevail: (Co. Litt. 299.) But if the limitation contained in the habendum had been of a lesser estate, as a limitation for life where the grant was in fee, the habendum would be held repugnant, and the granting clause would prevail: (2 Roll. Abr. 24; 2 Bac. Abr. 494; Hob. 171.) There is one exception, however, to the latter rule, which is in the case of a limitation in tail by the habendum, where the granting clause is in fee, which two limitations have not been treated as so repugnant but that both may stand together in the manner we have already noticed.

Office and operation of the habendum.]—The office of the habendum is to limit the estate of the grantee by name, with

such additional words as will clearly and unequivocally express the estate he is to take in the subject-matter of the conveyance, as in fee, in tail, for life, *pur autre vie*, or for years.

Habendum may control construction of law.—If necessary, words may be employed in the habendum to modify or control the construction of law upon the words of limitation previously employed; as where lands are designed to be conveyed to the grantees as tenants in common, in which case the general words of limitation, which would have created a joint tenancy, are modified by subsequent expressions so as to convert that estate into a tenancy in common.

Habendum clause, how usually worded.—The clause generally commences in the following words, "TO HAVE AND TO HOLD," but whenever brevity is an object, the first three words may be safely left out; the two latter words, "TO HOLD" being the only operative words that are actually essential. The property which forms the subject-matter of the grant, and which has been previously described, should be here referred to by a short description, sufficiently comprehensive to embrace it, and if the conveyance is to be simply in fee, should be limited to the grantee and his heirs, to whose use the property is to be declared (see the form 1 Con. Prec., Part II., Section I., No. III., clause 3, p. 55; *id. ib.* No. XXXVIII., clause 5, p. 209, 2nd edit.), or if such be the intention, other uses should be declared to arise out of his seisin: (see the form 1 Con. Prec., Part II., Sect. I., No. I., clause 6, p. 46, 2nd edit.)

8. *Limitation of Uses.*

Use should be declared.—The use should always be declared, even where the conveyance is direct to the purchaser, although this is not absolutely necessary to vest the use in him, where he pays any consideration for the property, which, under severe penalties, is now required to be expressed in the conveyance (48 Geo. 3, c. 149; 55 Geo. 3, c. 184; 13 & 14 Vict. c. 97, ss. 22, 25); but if no consideration be expressed or reserved, nor any declaration of uses made, then the use will result to the grantor, and he will be in as of his former estate.

Modern mode of limiting uses where the purchase is in fee simple.—In modern conveyances, where the purchase is in

fee simple, the practice is, either to limit the property direct to the purchaser, or, where he has been married previously to the year 1834, and is desirous of holding the property unfettered by any right of dower in his wife, to limit such property to such uses as will effectually bar that right.

Practical directions for penning limitation of uses.]—If the purchaser is to take simply in fee, the property should be limited to him and his heirs, *to the use* of him, his heirs and assigns for ever, in the way we have previously noticed; but when dower uses are to be limited, or any other uses are designed to arise out of the seisin of the grantee, then that portion of the clause which limits the use to him must be left out, otherwise such limitation would vest the legal use in him, and thus all the uses limited to arise out of his seisin would be mere equitable estates: (1 Saund. Uses, 263.)

Various kinds of limitation of dower uses.]—Several modes have from time to time been resorted to for framing conveyances in such a manner as to prevent the right of dower of the purchaser's wife from attaching upon the purchased lands. The first method resorted to, and which although now grown obsolete, has not been very long discontinued, was to limit the property to the purchaser and a trustee as joint tenants in fee, but with a declaration that the latter held only as a trustee for the purchaser, by which means the wife's right of dower was prevented from attaching during the continuance of the joint estate of the purchaser and his trustee, a widow not being dowable out of an estate in joint tenancy (Litt. s. 45; Co. Litt. 37, b); but it was still liable to attach by the death of the trustee, for the joint tenancy would thereby determine, and then the husband would become solely seised of the whole property. The inconvenience resulting from this consequence gave rise to the practice of limiting the purchased lands "to the purchaser and his trustee, and the heirs of the trustee," or immediately to the trustee and his heirs, in trust for the purchaser and his heirs (*Curtis v. Curtis*, 2 Bro. C. C. 620), in both of which cases, the legal seisin of the husband was prevented by the creation of the trust; but notwithstanding the last objection was removed by this mode, it was still open to the other objections. It kept the legal estate from the purchaser, and exposed him to the possibility of its escheating for want of heirs in the trustee, or to the inconvenience of its becoming vested in infants, married women, or persons residing at a distance, or not easily

discoverable, or not willing to join in any conveyance to be made of it: (Co. Litt. 379, b, n. 1.) To prevent all these disadvantages, a mode of limitation was next introduced, by which a right of dower was permitted to attach upon the estate, but subject to be divested by the act of the husband in his lifetime. This was effected by limiting the property to such uses as the husband should appoint, and in default of appointment, to the use of his right heirs. Until this power was exercised by the husband, he was actually seised of an estate of inheritance in possession, on which the right of dower attached; but upon his making the appointment it was considered that as the appointee came in as if named in the deed creating the power, he was in paramount to the right of dower in the wife, and consequently held the estate discharged of her claims thereto: (*Maundrell v. Maundrell*, 10 Ves. 426; *Rae v. Pring*, 5 B. & A. 561; *Doe v. Jones*, 10 B. & C. 459.) But this form of limitation was not wholly free from objection, the power of appointment being liable to be suspended or destroyed, and as its existence is the only circumstance that bars his wife of dower, there was always the shadow of a possibility of danger in taking a title so circumstanced: (Co. Litt. 216 b. a. n. 2)

Modern plan of penning limitations to uses to bar dower.—At length a method was found out, by which all the advantages of the forms already mentioned were retained, and every inconvenience removed. This was effected by limiting the purchased lands to such uses as the purchaser should appoint (which power, if he executes, will confer a title in the appointee paramount to the claim of the wife, the former taking under the power limited by the original conveyance), and in default of appointment to the use of the purchaser for life, with a limitation to the dower trustee during the life of, and in trust for, the purchaser, with the ultimate limitation to the purchaser in fee; which ultimate limitation by the interposition of the estate in remainder to the trustee is an estate in remainder, upon which, so far as women married previously to the year 1834, are concerned, no right of dower can possibly attach: (see the form 1 Con. Prec., Part II., Section I., No. I., clause 6, p. 46; *ib.* No. II., clause 5, p. 53.)

How modern forms of limitations of dower uses differ from each other.—But although the above is the general outline of the modern limitation to uses to bar dower, there are still several forms differing from each other, even in essential

particulars. Sometimes the power of appointment is directed to be exercised by deed sealed and delivered in the presence of, and attested by one, two, or more credible witness or witnesses, and sometimes the power is extended to a disposition by will, either generally, or more frequently, to be attested in the presence of some specified number of witnesses. Mr. Butler, however, in his note to his edition of Fearn's Contingent Remainders, p. 437, says that no good reason can be assigned for requiring any specific number of witnesses to the execution of the deed by which the power is to be executed, it being quite sufficient to state that the power is to be executed by deed generally. It is also unnecessary to extend the power to testamentary dispositions, for as the will does not take effect until the purchaser's death, when the estate of the trustee ceases, the power is not then wanted for the purpose of over-riding his estate, and the interposed estate of the trustee prevents the dower from attaching at all during the lifetime of the purchaser, so that both his heir and his devisees would take entirely exonerated from the dower. The power of devising by will, therefore, is not only useless, but apt to give rise to nice questions, as to whether a testamentary disposition operated as a devise of the land, or as an appointment of the use, and thus make it doubtful in whom the legal estate is vested. For this reason the power to devise by will should be left out.

As to limitation to the dower trustee.]—The earlier practice in framing limitations of this kind was to limit the interposed estate to the dower trustee and his heirs; but it has become a more frequent practice in modern times to make the limitation to his executors and administrators, upon the supposition that it will generally be easier to find out and obtain the concurrence of the personal representatives, than an heir, the former of whom are less liable to be labouring under disability, but as such estates are not required to be conveyed, and the trustee's concurrence in any conveyances of the property altogether superfluous, it is perfectly immaterial what words of limitation are annexed to his estate.

As to the ultimate limitation.]—With respect to the ultimate limitation, Mr. Butler has suggested (see note to Fearn, C. R. 438) that as a life estate is first limited to the party, it seems more accurate to limit the fee to his heirs and assigns, and not to the party, his heirs and assigns. This mode of limitation Mr. Hayes condemns, pronouncing it

to be at once theoretically wrong, and practically dangerous, depending upon the rule in *Shelley's case* which in some instances might not be applicable, particularly in the case of limitations differing in quality, as where one is legal and the other equitable; and the latter opinion appears to be so far borne out by that of the profession generally, that we find in most, if not every, conveyance of the present day, a preference given to the limitation to the purchaser, his heirs, and assigns, to the form recommended by Mr. Butler, although, as far as purchasers are concerned, it can rarely happen that the latter form may not be safely adopted.

Limitation to dower uses less essential than formerly.—Dower uses are not so necessary now as they were in former times, and must daily become less frequent, because, since the statute (3 & 4 Will. 4, c. 105), any man who was unmarried previously to the year 1834, may debar his wife of her dower, by conveying away his property, which, unless protected by dower uses, he could not otherwise have done. It must also be recollected, that the dower uses will be insufficient to exclude any widow, who is married subsequently to the year 1834, from her title to dower, and in this respect it will make no difference whether the conveyance to dower uses was made previously, or subsequently to the dower act coming into operation: (*Fry v. Noble*, 25 L. T. Rep. 26.) Still, the rights to dower she would acquire under this act may be effectually barred by a declaration to that effect by the husband, either by deed or by will (statute 3 & 4 Will. 4, c. 105, ss. 4, 5, 6, 7); and for this purpose, a declaration is usually inserted in the purchase deed: (see the form 1 Con. Prec., Part II., Section X., clause 7, p. 48.) Notwithstanding this practice has become so universal, we can hardly suppose that husbands are generally aware of the unlimited powers they possess of debarring their wives of dower if they choose to exercise them; for if they were really conscious of this, surely more instances would occur in which a husband would rather run the risk of his wife taking one third of his property in case of his decease without having otherwise disposed of it, than that she should be left utterly destitute on account of his neglecting to make some provision for her in his lifetime. Under these circumstances, we suggest the propriety of a purchaser's solicitor explaining to his client exactly how the law stands in this respect, and then, however the latter may choose to act, the solicitor will at any rate have done his duty.

9. *Covenants.*

Vendor can only be required to enter into qualified covenants.]—Generally speaking, a vendor of lands can only be required to enter into qualified covenants to the following effect, viz.: 1. That, notwithstanding any act done by him to the contrary, he is seised in fee. 2. That he has good right to convey. 3. For quiet enjoyment by the purchaser. 4. For freedom from incumbrances created by the vendor, or persons claiming through or under him: and 5. For further assurance.

When vendor takes by descent, or under a will, his covenants must extend to the acts of his ancestors or testators.]—Where, however, a vendor takes by descent, or derives his title through a will, the purchaser is entitled to have these covenants extended to the acts of the vendor's ancestors or testators (*Lloyd v. Griffith*, 3 Atk. 267); for if merely restricted to the acts of the vendor himself and those claiming under him, although the covenant would comprehend a claim of his own wife to dower, it would not include a similar claim of the widow of a preceding ancestor or testator.

As to covenants where the conveyance is under a power.]—Where a vendor conveys under a power of appointment, he should, in addition to the usual qualified covenants for title, covenant that the power is good, valid, and subsisting. This covenant should precede the other covenants: (see the form 1 Con. Prec., Part II., Section I., No. IV., clause 3, p. 58, 2nd edit.)

As to general covenants.]—When a vendor is unable to confer a perfectly safe and marketable title, he sometimes enters into general covenants for title, by which he undertakes to indemnify the purchaser against the acts of all mankind; but however doubtful or defective his title may be, a vendor can never be compelled to do this. If the title is an imperfect one, the purchaser is entitled to rescind the contract, but he has no right to insist upon a vendor's conveying such a title as he can actually confer, and to indemnify him against any claims or incumbrances to which the property may be liable.

How covenants may be penned when the covenanting parties are numerous, and brevity is desirable.]—When the conveying parties who are to covenant for title are numerous, and par-

ticularly if brevity is desired, instead of going through the whole string of their names, it will be sufficient to describe them as the parties thereto of the first, second, third, fourth, and fifth parts, as the case may be, and if any of such parties are married women, a covenant from their husbands for them should be inserted to the following effect, viz., "such of them as are married covenanting for and on the behalf of their respective wives."

What covenants are considered synonymous, and what as distinct covenants.]—The covenants that the vendor is seised in fee, and that he has good right to convey, are considered so far synonymous covenants, that the qualified words annexed to the first covenant will attach to both (*Newins v. Munns*, 3 Lev. 46; *Browning v. Wright*, 1 Bos. & Pull. 139); but the covenants for quiet enjoyment and freedom from incumbrances are distinct covenants, and therefore qualified words in the commencement of the two first-mentioned covenants will not extend to them.

Covenant for seisin now usually omitted.]—As, therefore, the covenant that the vendor is seised in fee is synonymous with the covenant that the vendor has lawful authority to convey, the former is more frequently left out than inserted in modern conveyances, and is always omitted where brevity is an object; for the right to convey embraces not only the estate of the vendor, but also his power to convey it; hence, where a vendor, in a conveyance made by him and his wife of her lands, covenanted that he had good right to convey, she being then under age, was holden to be a breach of covenant: (*Nash v. Ashton*, T. Jones, 195.)

Covenant for quiet enjoyment.]—The covenant for quiet enjoyment being, as we have just before observed, a distinct covenant from that for seisin in fee, or right to convey, must, for the reason above stated, commence with words of qualification. This is usually done by restricting the breach to lawful disturbances, and by parties rightfully claiming; but this is not actually essential, as even an unrestricted covenant against the acts of all mankind will not comprehend a tortious eviction, but only evictions by parties having lawful title to the property: (*Hayes v. Bickerstaff*, Vaughan, 118; *Dudley v. Foliot*, 3 T. R. 384.)

How covenants should be qualified, where the property is intended to be sold subject to certain charges and incumbrances.]

—In case the property is to be sold and conveyed subject to any existing charges or incumbrances, as mortgages, rent charges, quit rents, or the like (*Hammond v. Hill*, Com. Rep. 180), a saving clause should always be inserted at the end of the covenant, as it also should in case there are any subsisting leases; but this is not so important in the latter instance, as the fact of possession by the tenant is of itself considered as sufficient notice to a purchaser of the interest which such tenant has in the land, and this renders it incumbent on a purchaser to take notice of the nature and extent of the purchaser's interest, which if he fails to do he must abide by the consequences of his neglect: (*Taylor v. Stibbert*, 2 Ves. 437; *Denn v. Cartwright*, 4 East, 29.)

How clause of freedom from incumbrances is usually penned.—The general words of the covenant for freedom from incumbrances usually embrace every kind of mode and instrument by which an incumbrance can be created, or by which the lands can be charged, incumbered, or prejudicially affected. In former times, it was the common practice to particularize the several species of covenants, as, for example, "all gifts, grants, bargains, sales, leases, mortgages, jointures, dowers, uses, trusts, wills, entails, statutes, recognizances, judgments," and a long string of other charges, which answered no other purpose than to swell the bulk of the deed. The practice has very properly given way to the more concise form now in use (see the form 1 Con. Prec., Part II., No. I, clause 9, p. 50, 2nd edit.), which is sufficiently ample for the purpose, and equally effectual in its operation as the more lengthy form it has so nearly superseded.

Circumstances under which a particular incumbrance should be specified.—But if there is any particular incumbrance by which a purchaser may possibly be prejudiced, and against which a vendor is to covenant to indemnify a purchaser, then it will be proper that such covenant should be particularly specified; as, for example, if the covenant is to be against the liability of the purchaser to the payment of an existing quit rent, the clause should run, "free from all estates, rights, titles, liens, charges, and incumbrances made or created, &c., and particularly of, from, and against a certain quit rent," &c.

Covenant for further assurance.—The covenant for further assurance runs with the land in like manner as the covenants for title, and will consequently be binding on the assignees of the vendor in case he should become bankrupt, who will

be compelled to execute further assurances, although the vendor was only tenant in tail, and did no act for the purpose of barring the entail: (*Pye v. Darby*, 3 Bro. C. C. 393.) Nor will bankruptcy, and the certificate of the covenantor, operate as a bar to the breach of this covenant, although the cause of action accruing before the bankruptcy was committed: (*Mills v. Auriol*, 1 H. Blackst. 433; *Hammond v. Toulmin*, 7 T. R. 612.)

Any act of vendor disabling him from performing covenant will amount to a breach of it.—If a vendor does any act whatever whereby he disables himself from performing his covenant for further assurance, it will amount to a breach although no request has been made to him to perform it, (*Moore*, 453, 755; *Poph.* 109; *Cro. Eliz.* 450, 479; 5 *Roll. Rep.* 20), as it would be useless to make a request for that to be done which could not possibly be complied with: (5 *Rep.* 50.)

To whom the right of action accrues for breach of this covenant.—If a breach is incurred of the covenant for further assurance annexed to a conveyance of freehold estates, the right of action will descend on the heir-at-law, and not on the personal representatives, in all cases where the ancestor himself has sustained no actual damage for the breach: (*King v. Jones*, 3 *Taunt.* 418; *Kingdon v. Nottle*, 1 *Mau. & Selw.* 355.)

What persons are entitled to nominate the mode of further assurance.—It belongs to the purchaser's counsel or solicitor to select what particular kind of instrument is to be adopted for the purpose of further assurance; but at the same time, the vendor's counsel or solicitor will be allowed to object to any mode of assurance being used that a vendor under ordinary circumstances would not be compelled to give to a purchaser; consequently, a vendor cannot be compelled to enter into a general warranty of title: (1 *Mod.* 67; 2 *Lev.* 140.) It has also been held, that where any person has once executed such further assurance as counsel for the party requiring it has advised, he is discharged from his covenant, although such assurance turn out insufficient for the intended purpose: (*Lassells v. Calterton*, 1 *Sid.* 467.)

Whether covenant for further assurance entitles a purchaser to call for a covenant to produce title deeds.—It is a doubtful question whether a covenant for further assurance will entitle a purchaser to call for a covenant for the production of title

deeds. In *Fain v. Ayres*, 2 Sim. & Stu. 533, the question arose, but was not decided; still, the prevailing opinion of the profession seems to be, that a purchaser has no such right, the covenant for further assurance being restricted to mean an assurance by way of conveyance, and not to comprehend further obligations to be imposed on a vendor by way of covenant: (*Hallett v. Middleton*, 1 Russ. 243.)

When vendor retains title deeds, purchaser is entitled to a covenant for their production.]—But however the above-mentioned question may be finally determined, one thing is quite clear; namely, that whenever a vendor retains the title deeds, the purchaser will be entitled to a covenant for their production, and also to supply copies, extracts, or abstracts of them.

How covenant for production of title deeds should be framed.]—A covenant for the production of title deeds may be included either in the purchase deed (see the form 1 Con. Prec., Part II. No. V., clause 9, p. 62, 2nd edit.), or it may be entered into by a separate instrument.

How penned when contained in the purchase deed.]—When the covenant is contained in the purchase deed, it usually comes in at the end, and is preceded by a short recital that the deeds relate as well to other property of the vendor as to that portion which has been sold to the purchaser, and that the vendor is to retain such deeds, and enter into a covenant for their production, which he then proceeds to enter into accordingly: (see the form 1 Con. Prec., Part II., Section I., No. V., clauses 8 and 9, pp. 61 and 63, 2nd edit.; *ib.* No. XXXI., clauses 6 and 7, pp. 176, 177.)

Where the covenant is entered into by a separate instrument.]—If the covenant is entered into by a separate instrument, the conveyance to the purchaser should be first of all recited, and then should come the recital with respect to the retention of the deeds by the vendor, and of his intended covenant for their production, which he will then enter into in precisely the same manner as in the other instance we have just before mentioned.

How covenant should be entered into where the title deeds, instead of being retained by vendor, are delivered over by a third party.]—A slight variation will be requisite from the forms above pointed out, where the title deeds, instead of

being retained by the vendor, are handed over by him to a third party, who is intended to enter into a covenant for their production: (see the form 1 Con. Prec., Part II., Section I., No. XXXI., clauses 6 and 7, pp. 176, 177, 2nd edit.)

As to covenants for the acknowledgments of married women.]—The Fines and Recovery Substitution Act, 3 & 4 Will. 4, c. 70, has introduced a new kind of covenant, which it often becomes necessary to insert in a purchase deed, which is, that such deed should be duly acknowledged by such married women as have any claim or title to the purchased property which their husbands are unable to defeat without their concurrence. This covenant is either inserted immediately after the limitation or declaration of uses and preceding the covenants for title, but it may be not unfrequently inserted after the latter covenants. As a married woman is incapable of entering into a covenant, this covenant must be entered into by the husband solely: (see the form 1 Con. Prec., Part II., Section I., No. VI., clause 7, p. 66, 2nd edit.)

As to covenants by trustees, mortgagees, &c.]—Trustees, mortgagees, heirs-at-law, executors and administrators, and all persons who take no beneficial interest in the property, whenever they concur in their respective characters in a conveyance, can only be required to enter into covenants that they have done no act to incumber (see the form 1 Con. Prec., Part II., Section I., No. XVII., clause 7, p. 107, 2nd edit.; *ib.* No. XXI., clause 8, p. 125); but whenever heirs, executors, &c., take a beneficial interest in the property, they will, like other vendors, be called upon to enter into the usual qualified covenants for title.

Mortgagor selling equity of redemption entitled to covenant of indemnity from purchaser against claims in respect of mortgage.]—When a mortgagor sells his equity of redemption, he is entitled to a covenant of indemnity from the purchaser, by which the latter undertakes to discharge the mortgage debt, and to indemnify the vendor from all claims in respect thereof: (see the form 1 Con. Prec., Part II., No. XXXVIII., clause 9, p. 210, 2nd edit.)

With whom covenants in a purchase deed should be entered into.]—The proper guide for selecting the proper persons with whom the covenants for title, and all other covenants intended to run with the land, should be entered into, is the

habendum clause of the purchase deed. If the limitation is made directly to the purchaser as unto and to the use of A. B., his heirs and assigns, or to dower uses for his benefit, then A. B. will be the proper person with whom the covenants should be entered into (see the form 1 Con. Prec., Part II., No. I., clause 8, p. 48, 2nd edit.); but if the limitation had been to J. S. and his heirs, to the use of A. B., his heirs and assigns, then J. S. would have been the party for the covenantee; for notwithstanding the transitory nature of his seisin, which is divested the very instant it takes place, it nevertheless forms a link in the chain by which the covenants become annexed and continue to run with the land through every subsequent modification such land may afterwards undergo: (*Roach v. Wadham*, 6 East, 829.)

How words of limitation should be annexed to covenants for title, &c.—In penning the usual covenants for title, &c., in purchase deeds, the same terms of limitation should be annexed to the name of the covenantee as are employed in limiting his estate in the habendum clause; as, for example, if the limitation is direct to A. B., his heirs and assigns, then the covenant should be expressed to be to him, his heirs and assigns; but if limited to J. S. and his heirs, *to the use of* A. B., his heirs and assigns, &c., then it would be more correct for the covenant to be with J. S. and his heirs alone, thus agreeing with the habendum, and the character in which he stands with respect to the conveyance.

10. Examination of Deeds.

Deed of conveyance must be examined with draft.—When the draft has been settled and approved, the next step is to get it engrossed, after which the deed should be carefully examined with the draft to see that it is transcribed *verbatim* with it, and any mistakes that may have occurred must be corrected.

Course to be adopted where erasures or interlineations are made.—Where erasures or interlineations become necessary, the solicitor who prepares the deed should place his initials in the margin opposite the places in which such alterations or erasures occur, in order to show that they were made previously to the execution, and enable him to depose to that fact in case it should happen to be called in question at any future period.

Draft of the conveyance should accompany the latter at the time of execution.—The draft of the conveyance should always accompany the latter at the time it is executed, so that it may be referred to if necessary for the purpose of showing that the one is a correct transcript of the other.

11. *Of the Execution and Attestation.*

How deeds ought to be executed.—The usual way of executing a deed is for the party to sign his name close to the seal, and then, making an impression on the seal, to declare that he delivers the instrument as his act and deed in the presence of witnesses, the latter of whom afterwards subscribe their names to a form of attestation indorsed on the deed, which usually states that the same is signed, sealed, and delivered by the conveying parties, in their presence.

As to the signature and seal.—Notwithstanding it has long become the universal practice to sign all deeds of conveyance, such an act is by no means essential to their validity, although sealing is, because no writing without a seal can be a deed (3 Ins. 169; 3 Prest. Abs. 61; Perk. s. 129; Shep. Touch. 56); the Statute of Frauds (29 Car. 2, c. 3) does not render signing necessary to the validity of an ordinary deed; for the signature required by that statute applies to mere agreements, or such other instruments as are unattended with the solemnities of a deed: (3 Prest. Abs. 61.)

As to the powers which require the signature of the parties.—But where the terms of a power prescribe signing, those terms must be strictly complied with, otherwise, being improperly exercised, nothing will pass under it.

What kind of sealing will suffice.—It is immaterial what kind of seal is employed; hence it has been said that if a party seal the deed with any seal whatever, either his own, or one belonging to any one else, or with a stick, or any such like thing that doth make a print, it is good; and although it be a corporation that doth make the deed, yet they may seal with any other seal than their common seal, and the deed never the worse (Perk. sect. 130; Shep. Touch. 57); and if there be a score or more of persons to seal one deed, it will be sufficient if they make distinct and several prints. But it seems, notwithstanding the contrary was once held (*Bull v. Dunsterville*, 4 T. R. 313), that a

deed executed by one of two partners in the names of the partnership firm will be considered merely as the deed of the executing party, and will not affect the interests of the other partners; for even a general partnership agreement, although under seal, does not authorize the partners to execute deeds for each other unless a particular power is given for that purpose: (*Harrison v. Syke and Rushforth*, 7 T. R. 207.)

Not essential that seal should be of wax.—It is not necessary that the deed should be sealed with wax; for any substance that will admit of an impression, as a wafer, or the like, will answer the same purpose.

Ceremonies to be observed on the delivery of a deed.—The author of the Touchstone remarks (p. 75), "That delivery is either actual, *i.e.*, by doing something or saying nothing, or else verbal, or saying nothing; or it may be by both. And either of these may make a good delivery, and a perfect deed. But by one or both of these means it must be made, for albeit it be ever so well sealed and written, yet the deed is of no force." A third party may, however, be deputed to seal and deliver a deed, or it may be delivered to a third party who is a stranger to a deed on behalf of the grantee. And where a person, in whose name the deed is to be delivered by a third party, is present at the time of delivery, a mere verbal authority will be sufficient; but if the delivery is to take place in his absence, a power of attorney will become necessary, because a person cannot, unless authorized by deed, execute an instrument as the act of a person who is absent: (Shep. Touch. 58; 1 Ins. 52 a.)

How a deed must be executed by attorney.—When a deed is executed by attorney, he ought to deliver it as the act and deed of his principal (*Combe's case*, 9 Rep. 75; *Hawkins v. Kemp*, 3 East, 410); and he should sign the deed with the name of his principal either alone, or with the addition of "by A. B. (*his own name*), his attorney:" (3 Prest. Abs. 67.) It is generally considered that a purchaser has a right to insist upon the deed being executed by the principal himself, and is not bound to accept a title depending on a conveyance by attorney: (*Mitchell v. Neal*, 2 Ves. sen. 679.) But Mr. Preston observes that it may be questioned whether this objection will hold good, when the instrument creating the authority is delivered to the purchaser, and it is indisputable that the party was alive at the

time of the execution by his attorney. "The decision," the same learned writer adds, "goes no further than to give to a purchaser, if he think fit, a right to have the deed executed by the party in person: (3 Prest. Abs. 66.)

Act of sealing should precede the delivery.—The act of sealing must precede the delivery of the deed, otherwise nothing will pass by it; but it will be immaterial, if properly sealed and delivered, whether those acts be done before or after the day on which the instrument bears date: (4 Co. 46.)

Delivery may be either actual or conditional.—A delivery may be either actual or conditional,—that is, to the grantee or party himself; or to a third person, to hold until some conditions be performed on the part of the grantee, in which last case it is not delivered as a deed, but merely as an escrow or scrowl in writing, which is not to take effect as a deed, until the conditions be performed, and then it becomes a deed to all intents and purposes (Co. Litt. 36; 2 Bla. Com. 307; Shep. Touch. 58), and becomes of the same force as if it had been delivered immediately to the party to whom it is made: (*Jennings v. Bragge*, cited 3 Rep. 35; *Periman's case*, 5 Rep. 84.)

Usual modern practice.—The usual modern practice is for the party to sign his name, and then, making an impression on the seal, to say, in the presence of the witness or witnesses, "I deliver this as my act and deed."

Requisites to the attestation.—One witness is necessary to the execution of the deed, and he ought, in accordance with the general practice, to sign his name as such, to the attesting clause usually indorsed at the back of the deed; still, this signature is not essential, unless in those cases when it is directed to be so done by the terms of a power (3 Prest. Abs. 71); the object of having witnesses being rather for the purpose of preserving the evidence, than for constituting the essence of a deed itself.

Ancient practice respecting the attestation of deeds.—The ancient practice was to register in the deed the names of the persons who attested as witnesses, which was formerly done without the witnesses themselves signing their names, that not being always in their power, but they only heard the deed read, and then the clerk or scribe added their names in a sort of memorandum. But this practice has been

long since disused, and it seems that from as far back as the reign of Henry the Eighth down to the present time, the witnesses have subscribed their names, either at the bottom or at the back of the deed: (2 Ins. 78; 2 Bla. Com. 308.).

Propriety of indorsing the attestation.—But, notwithstanding it is not absolutely necessary that the witnesses should sign the attestation clause, it ought never to be omitted, as it may cause serious objections to be raised to the title at some future period, as no person could be forced to take a title so circumstanced, until the execution was proved by some one who was present at the time, and witnessed the execution and attestation, and is able to speak to the accuracy of those facts.

As to the date and title of the deed indorsed thereon.—The usual practice is to indorse the date, names of parties, and title of the instrument, upon the back of the deed, but this is not necessary; neither does it give any validity whatever to the instrument, nor would an error in the description affect it in the slightest degree; so that if it is marked extrinsically as a feoffment, or as a bargain and sale, this would not prevent its being pleaded as a release or assignment; neither will an indorsement convert that into a mortgage, which is an absolute and unconditional conveyance. As, therefore, the indorsement of the title of the deed has no actual operation upon it, the words employed for that purpose are not counted in the number of words in casting up the folios with respect to the *ad valorem* and progressive stamp duties.

Where any of the conveying parties are married women.—If any of the conveying parties are married women, then not only will it be necessary that the latter should execute the deed, but also that they should duly acknowledge the same in pursuance of the Fine and Recovery Substitution Act, and that a memorandum of such acknowledgment should be indorsed on the deed: (see the form 1 Con. Prec., Part II., Section I., No. VII. clause 1, p. 67, 2nd edit.) A certificate of acknowledgment must also accompany the conveyance: (see the form, *ib. id.*, clause 2.)

Purchaser, on execution of conveyance, entitled to the title deeds.—Upon the execution of the conveyance the purchaser is entitled to have the title deeds delivered up to him (*Hooper v. Ramsbottom*, 1 Marsh, 414); but where the estate is sold in lots, the purchaser of the largest lot, and

not the purchaser of several lots which, combined, are larger than the largest single lot, is to have the deeds; and by the term largest lot, is meant largest in quantity of acreage, and not in amount of purchase money: (2 Smith, 211, 3rd edit.; *Griffiths v. Hatchard*, 18 Jur. 649.)

Purchaser of largest lot entitled to custody of title deeds.—But the purchasers of the other lots are entitled to a covenant for the production of all such of the title deeds as relate to the property they have purchased, as also to be supplied with attested or other copies, extracts, or abstracts, at their own expense: (Hard. 152; Ayck. 437, 5th edit.)

Order for the delivery of deeds, how obtained when sale is under a decree.—A direction for the delivery of the title deeds is often contained in the order for payment of the purchase money; but if this has not been done, the order may be obtained on motion or at chambers: (Ayck. 438, 5th ed.)

Before whom acknowledgment is to be made.—The acknowledgment of a married woman is directed to be made either before one of the judges of the superior courts of Westminster, or a Master in Chancery, or two of the perpetual commissioners appointed under the act (3 & 4 Will. 4, c. 74, s. 79); or where, by reason of residence beyond the seas, or ill health, or any other sufficient cause, the married women shall be prevented from so acknowledging the deed, before special commissioners to be appointed by the court of Common Pleas: (s. 83.)

Persons taking acknowledgment must sign memorandum, &c.—The persons taking the acknowledgment must sign a memorandum and certificate: (see the forms 1 Con. Prec., Part II., No. VII., clauses 1 and 2, p. 67, 2nd edit.) The certificate, with an affidavit verifying the fact, is then to be filed in the Common Pleas. The deed takes effect from the time of acknowledgment, without respect to the time at which such certificate and affidavit are filed. Care must be taken in preparing the certificate and affidavit, so that they may be perfectly consistent with each other; for, if inconsistent, the court will not allow them to be filed (*Re Dixon*, 4 B. C. 631), neither will the court permit a certificate to be so amended as to make it vary from or alter the sense of the affidavit.

One of the commissioners must be a person not interested in the transaction.—The General Rules published by the court of Common Pleas in Hilary Term, 1834, provide, that in

case of an acknowledgment before commissioners, one at least of such commissioners shall be a person who is not interested in the transaction, or concerned therein as attorney, solicitor, or agent so interested or concerned.

How examination is to be conducted.—By the same rules, the commissioners are to inquire of the married woman, separately from her husband and from the attorney or solicitor employed in the transaction, whether any provision is made for her in lieu of the interest which she gives up; and, if so, are to satisfy themselves, before the taking such acknowledgment, that such provision has been made by some deed or writing produced to them, or, if not made, then they are to require its terms to be reduced into writing, and verify the same by their signatures; and the affidavit, which may be made by one of the commissioners, although he be the solicitor employed in the transaction, is to be in the form annexed to such general rules: (see forms of certificates relating to acknowledgments, 1 Con. Prec., pp. 367 to 370.)

Where the acknowledgment is taken abroad.—When an acknowledgment is taken abroad, a commission for that purpose may be obtained upon application to the Court of Common Pleas. No qualification is required for a commissioner, consequently a person of any profession or calling may be appointed to this office: (stat. 3 & 4 Will. 4, c. 74, s. 83.) It is, however, a usual practice, where a British Consul is resident near the place, to nominate him as one of the commissioners, and it is also advisable to insert the names of three or four persons in the commission, in case any of them should be unable or unwilling to act. The Court of Common Pleas will require an affidavit of verification, sworn and authenticated according to the local law, unless it be distinctly shown that great inconvenience would result from a strict adherence to the ordinary rule: (*Re Crawford*, 4 C. B. 626; and see *Re Eady*, 6 Dow. P. C. 615; *Re Schiff*, 1 Dow. & L. 911.) Upon this principle, the court has received an affidavit sworn before a British consul, upon evidence that he was, according to the *lex loci*, competent to administer an oath (*Re Darling*, 2 C. B. 347), or that there was no local authority within reach that possessed such a power (*Re Pickergill*, 6 Man. & Gr. 260; *Re Stubbs*, 5 Scott N. R. 327); but the court has rejected such an affidavit not sworn according to the law of the place, where it did

not appear that there was no local authority competent to take the affidavit: (*Re Dunsany*, 7 C. B. 119.)

By whom costs of taking acknowledgment are defrayed.—The costs of taking an acknowledgment are always borne by the vendor. But where there are several vendors, some only of whom are married, those who are married must defray the costs of the acknowledgments of their respective wives, and have no right to call upon the other vendors for any contribution towards these expenses.

When the concurrence of husband is dispensed with.—In certain cases the consent of the husband to his wife's acknowledgment is dispensed with; as where he is a lunatic, idiot, or person of unsound mind, and whether he shall have been found so by inquisition or not, or shall, from any other cause, be incapable of executing a deed, or making a surrender of lands held by copy of court roll, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent or by sentence of divorce, or in consequence of being transported beyond the seas, or from any other cause whatever, it shall be lawful for the court of Common Pleas at Westminster, by an order to be made in a summary way upon the application of the wife, and upon such evidence as to the court shall seem meet, to dispense with the concurrence of the husband in any case in which his concurrence is required (stat. 3 & 4 Will. 4, c. 74, s. 91), which clause of the act has been held to extend also to copyholds: (*Ex parte Shirley*, 5 Bing. N. C. 226.)

Course of proceedings where deeds have been deposited with the clerk of records and writs.—Where the title deeds have been deposited with the clerk of records and writs, it is the duty of the vendor to get them out, and to deliver them to the purchaser at the expense of the estate. If the parties in the cause are capable of consenting, and will consent, the order may be obtained upon a petition or motion as of course: (2 Smith, 211, 3rd edit.; Ayck. 438.)

To whom the draft of conveyance belongs.—Although it is the usual practice to leave the draft of conveyance with the purchaser's solicitor, it is in reality the property of the client, and the solicitor is not only bound to deliver it up to the latter, if demanded, but his detaining it has been called an act of negligence: (*Doe v. Seaton*, 2 Add. & Ell. 178.)

Conveyances of lands lying in register counties should be registered immediately after execution.—Whenever the lands which form the subject-matter of the conveyance lie in a register county, it is the duty of the purchaser's solicitor to get such conveyance registered as soon as it is executed: (*Mittleholtzer v. Fullarton*, 6 Ad. & Ell. (N. S.) 989.)

Memorandum of annuity or rent-charge must be left with senior Master of Common Pleas.—If the subject-matter of sale is an annuity or rent-charge, a memorandum or minute, containing the name and usual or last known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the date of the deed, bond, instrument, or assurance whereby the annuity or rent charge is granted, and the annual sums to be paid, must be left with the senior Master of the Court of Common Pleas at Westminster, who will enter the particulars in a book in alphabetical order, by the name of the person whose estate is intended to be affected by the annuity or rent-charge, with the date of the year and month when the memorandum is left, for which a fee of 2s. 6d. is payable: (stat. 18 Vict. c. 15, s. 2.)

12. *Payment of the Purchase Money.*

To whom the purchase money should be paid.—The purchase money becomes payable to the vendor as soon as the conveyance has been executed by all the necessary parties, and ought, strictly speaking, to be put into his hands only, unless he gives a written authority to pay it over to some person therein named; as neither his agent (*Blackburn v. Scholes*, 3 Camp. N. P. C. 343) or his solicitor can, without a special authority from him, either receive such money or give an effectual discharge for the same. Neither, is a memorandum of the receipt of the consideration money indorsed on the deed conclusive evidence of its payment.

Where several persons are entitled to the purchase money.—Where the purchase money is expressed in the conveyance to be paid to several parties, then the payment must be made, either jointly or severally, accordingly as they are entitled to receive it; for whether it be payable to several persons jointly or severally, it cannot be safely paid to any fewer than the entire number, unless there is, which does not often

occur, a special power or trust authorizing a payment in any other manner ; consequently, in a sale by trustees, however numerous they may be, all who have not disclaimed must concur in the receipt. In all well-penned trusts or powers of sale, it is generally directed in what manner the purchase money shall be paid, as to the trustees, or the survivors or survivor, his executors or administrators, in which case the payments must be made accordingly. Thus, for example, if there are three trustees, and one die, the purchase money must be paid to the two survivors, or if two die, to the last survivor ; and in case all three die, then the payment must be made to the personal representatives of the last surviving trustee.

Purchase money should be paid in strict accordance with the contract.—Even when the vendor has given a sufficient written authority to authorize his agent or solicitor to receive the purchase money, the purchaser must still be careful not to make such payment before the appointed time, or in any other manner than in strict accordance with the contract ; for if he does so, the authority given him by the vendor will afford him no protection in case the agent or solicitor should misapply the money : (*Parther v. Gaitskill*, 13 East, 432.)

Where the sale is of the property of bankrupts or insolvents.—In case the property is sold under proceedings in bankruptcy, the purchase money must be paid to the official assignee : (12 & 13 Vict. c. 106, s. 39.) If the sale is of the property of an insolvent, and is sold by the Insolvent Debtor's Court, the purchase money must be paid to the provisional assignees ; but if sold under proceedings in the County Court, it must be paid to the clerk of such court : (10 & 11 Vict. c. 102, s. 5 ; and see Macrae's Pract. Insolvency.)

In what manner purchase moneys must be paid upon a sale by statutory owners.—Where a sale is made by a mere statutory owner under the Lands Clauses Consolidation Act, 1845, the entire purchase and compensation money, if amounting to 200*l.*, must be paid into the Bank, or (if under 200*l.* but exceeding 20*l.*) into the Bank or to trustees, and to be applied in manner directed by the 69th and two following sections of the act ; and no part of the purchase money can be safely paid to the statutory owner. The above provisions comprehend as well moneys agreed to be paid to a statutory owner for assenting to or not opposing the passing of the bill authorizing the taking of the lands ; but

the Court of Chancery, or the trustees, may allot him a portion of the sum so paid as a compensation for personal injury, inconvenience, or annoyance: (s. 73.)

Course of proceeding upon petition for payment of money out of Court.—In all petitions under acts of Parliament for the sales of property for public purposes, where the purchase money is directed by the act to be paid into court, the petitioner claiming to be entitled to the money so paid in must, in addition to the usual affidavit verifying their title, make oath that they believe they have a good title, and are not aware of any right in any other person to the sum mentioned in the petition, or any part thereof.

Purchaser's right to apply purchase money in discharge of incumbrances.—As the vendor remains liable for all defects in his title until the purchase deed is executed by all the necessary parties, if any incumbrances are discovered which he neglects or refuses to pay off, the purchaser will be entitled to apply a sufficient portion of the purchase money in discharge of them, but he will not be allowed to retain any portion of the purchase money as an indemnity against a contingent charge and for which he has agreed to accept the vendor's covenant: (*Vane v. Lord Barnard*, Gilb. Eq. Rep. 6.)

III. ASSURANCES OF COPYHOLD AND CUSTOMARY ESTATES.

Mode of assurance for passing copyholds.—Copyholds or customary estates pass by surrender and admission. In ordinary purchase deeds of copyholds, two modes of assurance may be selected. One is to surrender the copyholds to the purchaser, and by a separate deed to enter into the usual covenants for title: (see the form 1 Con. Prec., Part II., Section III., No. II., p. 309, 2nd edit.) The other is for the vendor to enter into a deed of covenant to surrender the copyholds to the purchaser's use, with a declaration of trust in favour of the purchaser and his heirs until such surrender be made, to which are added the usual qualified covenants for title: (see the form 1 Con. Prec., Part II., Section III., No. I., p. 301, 2nd edit.)

Copyholds not within Statute of Uses.—Copyhold estates not being within the Statute of Uses, that statute cannot execute the use in the surrenderee, so that until he be

actually admitted, the legal estate still continues in the surrenderor; still, upon admission, the surrenderee will immediately become clothed with the whole legal estate, in the same manner as it would have vested in *cestui que use* in freeholds through the medium of the Statute of Uses relating back to the date of the surrender, and operating from that time: (*Benson v. Scott*, 1 Salk. 185; S. C., Carth. 279; 3 Lev. 385; *Doe dem. Bennington v. Hall*, 16 East, 208.)

Purchaser's solicitor should ascertain that surrender is perfected before he allows his client to pay the purchase money.]—But as the surrender passes no more than an equitable estate, it will be prudent, in many cases, for the purchaser's solicitor to ascertain that the surrender is perfected before he recommends his client to pay his purchase money; for, until such surrender is made, it is in a vendor's power to defeat the purchaser's equitable interest under the covenant by surrendering to a third party, who, in the absence of any notice of the previous deed of covenant, or of the former purchaser's title, would be entitled to the benefit of the legal estate, and thus, possibly, the former purchaser may become deprived of the property altogether: (7 Jarm. Byth. 332, 504.)

Presentment of surrender should be made as soon as complete.]—As soon as the surrender is complete, the purchaser should make a presentment of it, which, if taken out of court, should, according to the customs of most manors, be made at the next court day (Co. Cop. s. 3, Tr. 88; Gilb. Ten. 220, 280; Scriv. Cop. 277; *Mitchell v. Neale*, *ib.* 679), although, by a special custom, it may be made at a subsequent one: (*Moore v. Moore*, *supra.*) In *Horlock v. Priestly* (2 Sim. 77), the court certainly expressed an opinion that even in the absence of any special custom a surrenderee has an inchoate legal title, capable of being made complete whenever it may suit his convenience to have the surrender presented; but the correctness of this opinion has been much questioned; and in a case decided about the same time in the Court of King's Bench, in which a question of this kind was mooted (*Doe v. Callaway*, 6 B. & C. 492), Lord Tenterden, although he said it was not necessary in the case before him to give an opinion whether such a custom was good in point of law, yet he must say he should have great difficulty in holding that it was so. And even where such a custom can be supported, no time should be lost in getting such a presentment made; for if a subsequent surrenderee should make a prior present-

ment, he would exclude the former surrenderee, even though both presentments should be made at the same court: (*Burgaine v. Spurling*, Cro. Car. 273; S. C., Sir W. Jones, 306.)

Presentment must correspond with surrender.—It is also essential that the presentment should correspond in all material points with the surrender, as any variance between them might prove fatal: (Scriv. Cop. 279; Wat. Cop. 88.)

It must be ascertained that presentment has been entered on the rolls.—It is also necessary to ascertain that the presentment has been duly made and entered on the rolls. This is a matter of the utmost importance; for although some contend that a presentment is only for the purpose of apprising the lord that a surrender has been made, which is unnecessary where the lord has acquired that information by any other means, there are others who argue just as strongly that a presentment is in every instance of as much importance as a surrender or admittance; that it is an integral part of the copyhold assurance, the tenant holding by copy of court roll, and the presentment being an essential part of that roll; and, in short, that the want of a true presentment will be a fatal defect in the surrender and admittance: (Scriv. Cop. 279; and see also Coventry's note to 1 Wat. Cop. 80.)

Presentment, wrongly entered, may be amended.—If the presentment be truly made, and is in proper accordance with the surrender, but wrongly entered on the rolls, the roll may be amended: (*Burgesse & Foster's case*, 1 Leon. 289; *Winter v. Jerningham*, Dy. 251; Gilb. Ten. 192; Co. Cop. s. 40.)

Court rolls not the only evidence of surrender and presentment.—The court rolls, although they afford the best, are not the only evidences of the surrender and presentment, which may also be proved by drafts of an entry produced from the muniments of a manor, and the testimony of the foreman of the homage who made such presentment: (*Doe dem. Priestley v. Callaway*, 6 B. & C. 848.) Nor is an entry on the rolls in all cases conclusive on the parties, as a mistake in any entry may be shown in an averment in pleading, or by evidence before a jury: (*Burgesse & Foster's case*, 1 Leon. 289; *Kite v. Quenton*, 4 Cox, 25.)

By whom the costs of conveyance are to be defrayed.—In

the conveyance of copyhold or customary estates, the purchaser must pay the expenses of the surrender and of his admission, as also of the fine payable on such admission. The latter, indeed, the purchaser is bound to pay, notwithstanding the vendor has covenanted to surrender and assure the copyholds at his own charges; for the title is perfected by the surrender and admission, and the fine is not payable until afterwards: (*Dalton v. Hammond*, 4 Co. 28 a; *Graham v. Simes*, 1 East, 652.)

Manorial customs as to preparing surrenders.—A custom in a manor that the steward shall prepare all surrenders for a reasonable fee, appears to be valid: (*Rex v. Rigge*, 2 B. & Ald. 550; *Reg. v. Lord of the Manor of Basingstoke*, 8 Dowl. P. C. 608.)

As to acknowledgments by married women.—A married woman may bar her right in copyholds in the same manner as in freehold property, by making an acknowledgment in pursuance of the Fine and Recovery Substitution Act (3 & 4 Will. 4, c. 74.) If she has the legal estate, the conveyance must be by surrender; if her estate be merely equitable, a surrender by her and her husband, after she has been privately examined, is as binding as if her estate was legal (s. 90), or her equitable estate will pass by a mere acknowledgment under the act: (s. 77.) And a married woman may acknowledge a deed without her husband's concurrence in all those special cases in which a wife is authorized so to do under the provisions of the said act in the case of freehold property: (*Ex parte Shirley*, 5 Bing. N. C. 226.)

IV. ASSIGNMENT OF LEASEHOLDS.

By what instrument an assignment must be made.—Previously to the Statute of Frauds (29 Car. 2, c. 3), a parol assignment of a term of years would have been perfectly valid; but by the 3rd section of that statute, all assignments were required to be in writing, still, as this did not specify any particular kind of instrument, it might have been effected as well by a mere note in writing, as by deed, if it was signed by the party or his lawfully authorized agent, as prescribed by the statute. The Stamp Acts next stepped in (44 Geo. 3, c. 98; 55 Geo. 3, c. 184), and required all assignments, whether by deed or note in writing, to be stamped with the common deed stamp, yet these enactments did not alter the nature of the instrument itself, so that an

assignment, if properly stamped, might, as previously, have still been made by a simple note in writing: (*Rex v. Little Dean*, Str. 555.)

And so the law continued until the passing of the act (8 & 9 Vict. c. 106), by which it is declared that all assignments, *not being an interest which might have been created without writing*, made after the 1st of October, 1845, shall be void at law, unless made by deed.

Note in writing will be supported in equity.]—But, notwithstanding this last enactment, a mere note in writing, if duly signed by the parties, will nevertheless be supported in equity as an agreement, and as such will pass an equitable interest to the assignee.

As to parol leases.]—And as the Act of Victoria does not require a deed for the assignment of such an interest as might have been created by parol, it seems that a parol lease for a term not exceeding three years, and valid as such within the Statute of Frauds,⁽¹⁾ may even now be assigned by a simple note in writing if impressed with a proper stamp.

As to the stamps on assignments.]—It must also be borne in mind that the common deed stamp is only applicable to such assignments for which no actual pecuniary consideration is paid, and where no consideration, or a mere nominal one is expressed in the body of the deed; for whenever there is an actual consideration, the assurance then comes in under the head, "Conveyance by Assignment," within the express terms of the General Stamp Act (55 Geo. 4, c. 184), as also of the more recent enactment (13 & 14 Vict. c. 97), and will require an *ad valorem* stamp, which must be regulated in proportion to the amount of the purchase-money: (Hughes New Stamp Act, p. 78.)

How deed of assignment should be penned.]—In preparing an assignment of leasehold property, the original lease is usually recited, but if any mesne assignments have been made, it is only usual to recite the last assignment to the

(1) The 2nd section of the Statute of Frauds excepts all leases not exceeding three years from the making thereof, whereupon the rent reserved to the landlord, shall amount to two thirds of the improved value.

party who is to pass the legal interest in the premises: (see the form 1 Con. Prec., Part. II., Section II., No. V., clause 5, p. 262, 2nd edit.) These recitals are generally inserted immediately after the description of the parties, but sometimes, where brevity is desirable, they are inserted in a more concise form at the end of the granting clause, after the description of the parcels, as for example—

All which said premises were by indenture, dated the day of , made between (*lessor*) of the one part, and (*lessee*), of the other part, demised by the said (*lessor*) to the (*lessee*), from thenceforth, for an absolute term of 99 years, and the same premises, by virtue of divers mesne assignments, and ultimately, by an indenture dated the day of , made between A. B., of the one part, and the (*present assignor*), of the other part, became vested in the (*present assignor*), for all the unexpired residue of the said term.

Where the legal estate is outstanding in a third party.—In case any mortgage has been made, or the legal estate is in any way outstanding, then the deed creating such mortgage or other estate must be recited: (see the form 1 Con. Prec., Part II., Section II., No. V., clause 3, p. 263, 2nd edit.)

Burdensome or unusual covenants should be recited.—In case the lease contains any burdensome or unusual covenants, all these ought to be recited: (see forms of this kind 1 Con. Prec., Part II., Section II., No. II., clause 2, p. 249, 2nd edit.; see also clause A. *ib. in notis.*)

Where there is a covenant not to assign without licence.—Where the original lease contains a covenant or proviso against assigning without licence from the lessor, the latter ought to be made a party to the assignment, in which the covenant or proviso against such assignment should be recited, and also that the lessor has granted such licence, and is made a concurring party to the assurance for the purpose of testifying the same: (see the form 1 Con. Prec., Part II., Section II., No. II., clauses 1, 2, 4, and 5, pp. 248, 249, 2nd edit.)

Where lease contains a covenant for renewal.—If the lease contains a covenant for renewal, it should be so recited, as also the terms upon which such renewal is to be obtained: (see the form 1 Con. Prec., Part II., Section II., p. 243, *in notis* A. 2nd edit.)

Operative words.—The operative words that have been generally employed in a deed of assignment are "grant, bargain, sell, assign, transfer, and set over," but the expressions, "bargain" and "sell," although often used, are, strictly speaking, inapplicable to an assignment, although properly adapted to an original demise, where it is intended to transfer the actual possession through the medium of the Statute of Uses; but that statute has no application to the assignment of a term, and it is therefore more correct to omit those terms altogether. The strongest and most apt term is "assign," but the words "transfer," or "set over," will have precisely the same effect.

Parcels, how inserted and described.—The parcels are usually inserted *verbatim* from the original lease in its recital, and are merely referred to by a short general description in the operative part of the instrument, as "all the aforesaid messuage," &c. This mode is very well adapted for general purposes, where the property itself has undergone little or no change from the time it was originally granted, down to that of the assignment then made. But where it has undergone any important alteration subsequently to the creation of the term, so that the original description would not be particularly applicable to it; as where the demise was of a close of land, which has subsequently been built upon, the parcels should be described so as to correspond with these changes, and instead of being included in the recitals should be set out in the operative part of the deed.

All-estate clause.—The all-estate clause is proper in a deed of assignment if the assignor really does intend to assign all his estate and interest in the property; but for that very reason those expressions would be improper, where the assurance is intended to operate as an underlease; still, although incorrect, the effect of those expressions may, as we have previously remarked, be controlled by the habendum.

All-deeds clause.—It is also usual in assignments to insert the all-deeds clause, by which the original lease, and all other deeds and writings relating to the title of the premises are granted to the assignee: (see the form 1 Con. Prec., Part II., Section II., No. V., clause 6. p. 264, 2nd edit.)

Habendum..]—The habendum contains a short general description of the property, which is limited to the assignee for all the then unexpired residue of the term, subject to the rents and covenants (if any) of the original lease.

Usual covenants by vendor..]—The usual covenants entered into by the vendor are qualified covenants that, notwithstanding any act done by him, the lease is a valid lease; that he has good right to assign; that he has paid reserved rents, and performed all covenants up to the time of assignment, for quiet enjoyment and freedom from incumbrances, and for further assurance: (see the form 1 Con. Prec., Part II., Section II., No. I., clauses 6 to 10 inclusive, pp. 245 to 247, 2nd edit.)

Usual covenants by purchasers..]—The usual covenant from a purchaser is to indemnify the vendor from the reserved rents and performance of the covenants reserved and contained in the lease: (see the form 1 Con. Prec., Part II., Section II., No. I., clause 11, p. 247.) And whenever the vendor is the original lessee, the purchaser is bound to enter into this covenant, in the absence of an express stipulation to the contrary: (*Williams v. Fry*, 1 Mer. 244.)

Liability of original lessee to the covenants in the lease..]—This covenant is indeed a most important one, where the vendor is the original lessee, because he will remain liable to all express covenants entered into by him, which liability will endure throughout the whole term, notwithstanding his assignment to a third person, and the lessor's having actually accepted such assignee as his tenant: (*Orgill v. Kemshead*, 4 Taunt. 642; (*Auriol v. Mills*, 4 T. R. 94), but it is not an important covenant where the vendor is himself only an assignee of the term, because an assignee is only liable for breach of covenant during such time as he is in possession of the demised premises (*Tovey v. Pitcher*, 3 Lev. 295.)

And therefore, under the latter circumstances, the purchaser need not enter into any covenant of the above kind, for being only liable during the continuance of his estate, the assignee vendor has nothing left to indemnify him from.

V. WHERE PROPERTY OF DIFFERENT TENURES IS CONTAINED
IN THE SAME PURCHASE DEED.

As to the recitals.—It sometimes happens that the purchased property is of a mixed kind, part being freehold, and part leasehold, or of copyhold or customary tenure. Whenever this occurs, the proper way is to point out the several distinct tenures in the recitals, and in so doing those relating to the freehold portion of the property should come in first; next, those relating to the leaseholds, and if copyholds or customary estates are also to be included, the recitals relating to these should come in after those affecting the leaseholds: (see the form 1 Con. Prec., Part II., Section V., No. I., clauses 2, 3, and 6, pp. 374, 375, 2nd edit.)

As to the operative part of the deed.—The same order of arrangement should be observed in the granting clause or operative part of the deed. By this the freehold part of the property should be granted and released, the leasehold assigned, and a covenant entered into by the vendor to surrender the copyholds to the purchaser's use if no surrender has been made; but if the copyholds have been previously surrendered to the purchaser, then the uses of such surrender should be declared: (see clauses 8 and 12 in the form above referred to.)

Covenants.—When freeholds, leaseholds, and copyholds are included in the same deed, the covenants for title may be blended together so as to embrace the whole property; viz., that the vendor has good right to convey the freeholds, assign the leaseholds, and surrender the copyholds, and for the quiet enjoyment of each free from incumbrances; and also for further assurance: (see clause 13 in the form above referred to.)

Ancient demesne.—It is a common practice to convey lands held in ancient demesne by lease and release, and also under the statute (4 & 5 Vict. c. 21), which dispenses with the lease for a year. It seems, however, that lands of the tenure of ancient demesne do not fall within the statute (8 & 9 Vict. c. 106), which renders it unnecessary to make any reference to the lease for a year; for as a correspondent of the *Law Times* very aptly remarks (Vol. XIV., No. 358, p. 429), the words of the last-mentioned statute are confined to such corporeal hereditaments as regards the conveyance of the immediate *freehold* thereof; whereas it is quite clear,

both upon principle and authority, that the freehold of lands in ancient demesne is in the lord, and for that reason the statute cannot comprehend a conveyance of land of that tenure. Under these circumstances, therefore, the prudent course will be to convey property of this kind in pursuance of the statute (4 & 5 Vict. c. 21), and to refer to the lease for a year, or else to convey in the old form by lease and release.

Objection to including freeholds and leaseholds in the same deed.—It is not, however, considered advisable to include both freehold and leasehold property in the same deed, unless where they are designed to be occupied together, and to be transmissible to the same persons as the freeholds; because, on the decease of the owner of the respective properties, they would devolve upon a different class of representatives, and be transmissible in a different course, when some difficulty and inconvenience might arise with respect to the possession of the title deeds.

VI. HOW THE DEED SHOULD BE PREPARED WHEN IT IS DESIGNED TO OPERATE BOTH AS A PURCHASE DEED AND MORTGAGE.

Purchase and mortgage may be both comprised in the same instrument.—When part of the purchase money is allowed to remain upon mortgage, the purchase and mortgage are sometimes both contained in the same deed.

Old and modern practice respecting.—The old practice was to create a term of years for this purpose, which was limited to the vendor as his mortgage security, the inheritance being conveyed to the purchaser; but the modern plan is to reassure the fee to the purchaser for that purpose by limiting the property to him and his heirs to the use of the vendor, his heirs and assigns, subject to a proviso for redemption on payment of the remainder of the purchase-money and interest, with powers of sale in default. The vendor then enters into the usual qualified covenants for title; and the purchaser into the usual general covenants from a mortgagor, viz., for payment of principal and interest, that he has good right to convey, for quiet enjoyment and freedom from incumbrances, and for further assurance, concluding with covenants from the vendor that the purchaser shall enjoy until default, and that the former will not exercise power of sale without giving the

purchaser six calendar months' previous notice: (see the form 1 Con. Prec., Part II., Section I., No. XVI., p. 98, 2nd edit.)

As to copyholds.]—Where the subject-matter of the purchase and mortgage consists of copyhold property, a slight variation of the form will become necessary. For this purpose, the copyholds should be surrendered to a mutual trustee in fee, in trust for the vendor, his heirs and assigns, subject to a proviso for redemption on payment of the sum secured by the mortgage; and then the vendor should enter into qualified, and the purchaser into general, covenants, as in the case of freeholds we have just before noticed.

VII. DISENTAILING ASSURANCES.

1. As to freehold estates.
2. As to copyholds.

1. *As to Freehold Estates.*

Assurance usually prepared in a concise form.]—Disentailing deeds are usually penned in a concise manner in order to save unnecessary costs of the enrolment, which, where the deed runs to any considerable length, becomes a matter of consideration to the vendor upon whose shoulders these expenses fall.

Entail may be barred either by the deed of conveyance or by a distinct instrument.]—The entail may be barred either by the deed which conveys the property to the purchaser or by a separate instrument; but the more usual practice is to bar the entail by a distinct deed; and this will be essential where the tenant in tail is desirous of cutting off the entail of his whole property, but of which he only intends to sell a portion.

How disentailing deed should be penned.]—In preparing a disentailing deed merely for the purpose of barring the entail, no recitals are necessary, neither is any consideration expressed, but the deed, immediately after describing the parties to it, proceeds to witness that, for the purpose of barring the estate tail of the tenant in tail in the premises, and all rights, titles, interests, and powers to take effect after the determination or in defeasance of such estate tail, and to limit the same to the uses thereafter declared, the tenant in tail conveys to a trustee to uses, TO HOLD to the trustee and

his heirs, either directly to the tenant in tail in fee, or to uses to bar dower for his benefit: (see the form 1 Con. Prec., Part II., Section IV., No. I., pp. 327, 332, 2nd edit.)

Where the disentailing assurance and conveyance are contained in the same instrument.—Where the disentailing assurance and the conveyance to the purchaser are both contained in the same deed, it is usual, in such cases, to recite the deed, will, or other instrument by which the entail was created, and the state of the title from that period should be disclosed by the subsequent recitals. Thus, for example; suppose a settlement to have been made previously to and in contemplation of the marriage of the father and mother of the tenant in tail, by which the property is limited to the father for life, with remainder to the first and other sons of the marriage in tail, with divers remainders over, with the ultimate reversion to the father in fee, and the father having died, his eldest son becomes tenant in tail, and is desirous of barring such entail, and to convey the absolute estate in fee simple; in this case the marriage settlement should be first recited, then the marriage, next the death of the father (tenant for life), what issue he left, and that the tenant for life has attained his majority, and has contracted to sell the entailed property.

Where the protector to the settlement is a consenting party.—When the protector of a settlement consents to the disentailing assurance, and this is done by a distinct deed, the instrument creating the entail and appointing him protector must be recited, as also his consent to barring the entail, which consent he must give accordingly: (see the form 1 Con. Prec., Part II., Section IV., No. II., pp. 333 to 335, 2nd edit.)

Where the protector's assent is testified by the disentailing deed.—When the protector is a concurring party to the disentailing deed, the instrument creating the entail must be recited, for the purpose of showing how and in what manner the protector is constituted; as must also his consent to the disposition to be made by the tenant in tail, as in the precedent just before referred to; and in the operative part of the deed it must be stated that the tenant in tail, with the consent of the protector, testified by his being a party to the present assurance, Doth grant, &c.: (see the form 1 Con. Prec., Part II., Section IV., No. IV., clause 2, p. 339, 2nd edit.)

Where the entail is barred without the protector's consent.]—If the tenant in tail is unable to procure the protector's consent, and is desirous of barring the entail as far as he lawfully may, viz., his own estate tail, and thereby to create a base fee determinable on failure of his issue inheritable under such entail, in that case the deed, will, or other instrument creating the entail must be recited, as also that the tenant in tail is desirous of barring the entail and creating a base fee; he must then convey the lands to a trustee, to hold to him and his heirs to the use of the tenant in tail, his heirs and assigns, discharged of his own estate tail, but subject to the pre-existing estate, if any, in the protector or any other person or persons, and also subject to all such estates as are limited to take effect after the determination or in defeasance of such estate tail: (see the form 1 Con. Prec., Part II., Section IV., No. V., clauses 1, 2, 3, 4, 6 and 7 inclusive, pp. 341, 343, 2nd edit.)

Where the base fee is created in a conveyance to a purchaser.]—Where a tenant in tail, unable to obtain the protector's consent, bars his own estate tail and conveys the base fee thereby created to a purchaser, the recitals and operative parts are the same as in the precedent last referred to, except that in the operative part of the deed the property is conveyed directly to the purchaser; and the tenant in tail enters into qualified covenants that he is rightfully entitled to the estate tail limited to him with the remainders over; that he has good right to create the base fee; for quiet enjoyment; freedom from incumbrances; for further assurance; and also that, when competent so to do, he will perfect the title by entering into and executing all necessary acts and assurances for that purpose: (see the entire form 1 Con. Prec., Part II., Section IV., No. V., pp. 341, 345, 2nd edit.; see also form of further assurance in pursuance of last covenant, *id. ib.* No. VI., pp. 346, 347.)

Disentailing deed must be enrolled within six calendar months after execution.]—It is essential to the validity of a disentailing deed of freehold estates that it should be enrolled in Chancery within the space of six calendar months after execution (3 & 4 Will. 4, c. 74, s. 41); but the acknowledgment of a married woman of the execution of a disentailing deed may be taken subsequently to the enrolment of the deed, and after the expiration of the six months limited for such enrolment: (*Re London Dock Company's Act, ex parte Taverner*, 25 L. T. Rep. 241.) And notwithstanding a

disentailing deed must be enrolled within the six months, it will, when so enrolled, take effect from the time of its delivery. Still, for all this, a purchaser should lose no time in getting the disentailing deed enrolled, as a subsequent *bonâ fide* purchaser for valuable consideration would be entitled to priority in case he should get his deed enrolled before the first purchaser.

Enrolment of deed affords no proof of its execution.—No proof of the execution of the deed is required at the time of enrolment; consequently the certificate of enrolment of the instrument is no proof of its execution: (*Bishop v. De Burgh*, 6 L. T. Rep. 295.)

When wife of tenant in tail is a necessary party.—As a right of dower attaches on estates tail in possession, the wife must in that event be a concurring party in order to release her claim. In such case it ought to recite that she will concur for the purpose above mentioned, and it must be stated in the operative part of the deed, that for the purpose of relinquishing her right of dower, she, at the request of her husband, testified, &c., remises, releases, &c.: (see the form 1 Con. Prec., Part II., Section IV., No. III., *in notis*, p. 337.) The husband must also enter into a covenant that the deed shall be duly acknowledged by his wife, which must be acknowledged by her accordingly, and the memorandum thereof duly indorsed upon the disentailing deed: (see the forms 1 Con. Prec., Part II., Section I., No. VI., p. 65; *id. ib.* No. VII., p. 67, 2nd edit.)

Where entail is barred by tenant for life and remainder-man.—Where a tenant for life and remainder-man in tail are desirous of barring their estates tail, it is a very common practice to limit the lands, discharged of all estates tail, &c., to such uses as the tenant for life and remainder-man shall jointly appoint; and in default of such appointment, *to the use* of tenant for life, for the term of his life, without impeachment of waste, with remainder *to the use* of the remainder-man, his heirs and assigns for ever: (see the entire form 1 Con. Prec., Part II., No. IV., pp. 339, 340, 2nd edit.)

2. As to Copyholds.

How entails in copyholds are barred.—The provisions of the Fine and Recovery Substitution Act (3 & 4 Will. 4, c. 74) are applied to copyholds (sect. 50), except that dis-

positions of legal estates are to be made by surrender (see the forms 1 Con. Prec., Part II., Section IV., No. VII., p. 349; *id. ib.* No. VIII., p. 351, 2nd edit.), and of equitable estates either by surrender or by deed.

Where the protector is a consenting party.—If there is a protector, and the latter is a consenting party to the assurance, such consent must be stated in the memorandum of surrender: (see the form 1 Con. Prec., p. 349, *in notis*, 2nd edit.)

Where the protector consents by deed.—If the protector consents by deed, the latter must be produced to the lord or his steward at or before the surrender, and the lord or steward is to acknowledge such production by indorsement on the deed, and enter the deed and indorsement on the rolls, and the indorsement is to be evidence of the production, and the lord or steward is to indorse a memorandum of such entry: (sect. 51.) A similar form of deed may be employed in case of a protector consenting to a disposition of copyholds, or where a similar consent is given with respect to freehold estates, as in the form already referred to: (see *ante*, p. 256.)

Where the protector does not consent by deed.—In case the protector does not consent by deed, then the consent is to be given by him to the person taking the surrender by which the disposition shall be effected; and if the surrender shall be made out of court, it shall be expressly stated in the memorandum of such surrender that such consent has been given; and such memorandum shall be signed by the protector, and the lord of the manor of which the lands are parcel, or his steward; or the deputy of such steward shall cause the memorandum, with such statement therein as to the consent, to be entered on the court rolls of the manor; and such memorandum shall be good evidence of the consent, and of the surrender therein stated to be made. But if the surrender be in court, the lord or steward is to enter the consent on the rolls with the statement of the consent; and such entry, or a copy, will be as available for the purposes of evidence as any other entry on the court rolls, or a copy thereof.

A further memorandum, testified on such entry, should be indorsed on the deed, a form of which will be found 1 Con. Prec., Part II., Section IV., No. VII., p. 349, *in notis*, 2nd edit.

Enrolment not necessary in a disposition of copyholds.—Enrolment is in no case necessary to the validity of a disentailing assurance of copyholds, whether it be effected by deed or by surrender, otherwise than by entry on the court rolls: (sect. 54.)

As to disentailing assurances of equitable estates tail in copyholds.—The Fine and Recovery Substitution Act (3 & 4 Will. 4, c. 74) empowers an equitable tenant in tail of copyholds to dispose of them under the act by deed to be entered on the court rolls: (see the form 1 Con. Prec., Part II., Section IV., No. IX., p. 352, 2nd edit.) If the protector consents by a separate deed, it must be executed previously to, or simultaneously with, the disposition, and is to be entered on the court rolls.

VIII. AS TO THE PREPARATION OF THE CONVEYANCE WHERE THE SALE IS MADE UNDER A DECREE.

By whom the conveyance is to be prepared.—Where sales are made under a decree, the purchaser's solicitor is the proper person to prepare the conveyance, which he does at his client's expense; when so prepared, a fair copy of the draft is sent to the several conveying parties, or their solicitors for their approval, in the same manner as in the case of ordinary sales.

Where objections are taken to the draft.—If any objections are taken to the draft, about which the solicitors for the various parties are unable to agree, the draft is transmitted to the conveyancing counsel to be settled by him: (Ayck. 437.) Where a deed is settled by the court, it is sent to the judge's chambers, and from the judge's chambers it is sent to the conveyancing counsel: (*ib.*)

As to the engrossment, execution, and attestation.—The draft, when settled and approved, is engrossed by the purchaser's solicitor, and executed by the parties in the same manner as any other conveyance, the costs of which execution are in like manner paid by the vendor.

Course to be adopted if any of the parties refuse to execute.—In case any of the parties should refuse to execute the conveyance, the proper course to pursue will be to produce the engrossment of the deed in court, where it will be marked by the registrar; and upon an affidavit that the draft has been

settled and approved by the conveyancing counsel, and that the engrossment is a true copy of such draft, an order will be made for the execution of the deed by the party; (*Harvey v. Brooke*, 22 L. J. 14.) If the deed has been settled in chambers, the order is obtained on production of the certificate of the chief clerk, that the deed has been settled: (Ayck. 437, 2nd edit.) Upon service of the order and non-compliance, a vesting order may be obtained: (*ib.* and see Smith, 613, 2nd edit.)

CHAPTER V.

STAMP DUTIES.

I. STAMP DUTIES ON THE CONVEYANCE OR TRANSFER OF REAL PROPERTY.

II. PROGRESSIVE DUTIES.

III. DUTIES CHARGEABLE UPON THE SURRENDERS AND ADMITTANCES TO COPYHOLDS OR OTHER CUSTOMARY ESTATES.

IV. ERRORS AND OMISSIONS, HOW REMEDIED.

1. Where the wrong stamps have been used.
2. Where the instruments are unstamped at the time of execution.
3. As to the stamping of instruments executed abroad.
4. Allowance for spoiled stamps.
5. By whom the expenses of re-stamping instruments must be borne.

I. STAMP DUTIES ON THE CONVEYANCE OR TRANSFER OF REAL PROPERTY.

Origin and progress of stamp duties upon the conveyance or transfer of real property.—Stamp duties upon the conveyance or transfer of real property are included amongst the various subjects upon which these duties were instituted and imposed by the statute 5 & 6 Will. & M. c. 21. By several subsequent enactments additional duties were granted, which at length caused such a perplexing accumulation that it was found expedient to consolidate them. This was done by the statute 44 Geo. 3, c. 98. But, under the above-mentioned acts, the stamp duties on conveyances were uniform, and without reference to the amount of the purchase moneys, no *ad valorem* duties being imposed upon assurances of this kind until the passing of the statute 48 Geo. 3, c. 149, by which a duty was imposed commencing at 15s. and increasing to 500l. The statute 53 Geo. 3, c. 108, also contains various

provisions relating to *ad valorem* duties on conveyances, the whole of which were superseded by the General Stamp Act (55 Geo. 3, c. 184), which imposed another scale of duties in lieu thereof; which last-mentioned duties have again been superseded by the statute 13 & 14 Vict. c. 97, which also establishes a new scale of *ad valorem* duties, being those which are now required to be adopted upon all conveyances of real property.

Amount of stamp duties, how regulated.—The amount of *ad valorem* duties on conveyances must now, therefore, be regulated by the last-mentioned enactment; still, as questions must frequently arise in the course of a purchase, upon the stamps under the pre-existing General Stamp Act (55 Geo. 3, c. 184), we subjoin a Comparative Table, showing a scale both of the Old and New Stamp Duties.

Old Scale.	Old duty thereon.	New Scale.	New duty thereon.
Under 20 <i>l</i>	£ s. d. 0 10 0 }	Not exceeding 25 <i>l</i>	£ s. d. 0 2 6
20 <i>l</i> . } 25 <i>l</i> . 25 } 50	1 0 0 }	Exceeding 25 <i>l</i> . } 50 <i>l</i> . 25 } 75	0 5 0 0 7 6
50 } 75	1 10 0 }	" 75 } 100	0 10 0
75 } 100	1 10 0 }	" 100 } 125	0 12 6
100 } 125	1 10 0 }	" 125 } 150	0 15 0
125 } 150	1 10 0 }	" 150 } 175	0 17 6
150 } 175	2 0 0 }	" 175 } 200	1 0 0
175 } 200	2 0 0 }	" 200 } 225	1 2 6
200 } 225	2 0 0 }	" 225 } 250	1 5 0
225 } 250	2 0 0 }	" 250 } 275	1 7 6
250 } 275	2 0 0 }	" 275 } 300	1 10 0
275 } 300	2 0 0 }	" 300 } 350	1 15 0
300 } 350	3 0 0 }	" 350 } 400	2 0 0
350 } 400	3 0 0 }	" 400 } 450	2 5 0
400 } 450	3 0 0 }	" 450 } 500	2 10 0
450 } 500	3 0 0 }	" 500 } 550	2 15 0
500 } 550	6 0 0 }	" 550 } 600	3 0 0
550 } 600	6 0 0 }		
600 } 700	6 0 0 }		
700 } 800	9 0 0 }		
800 } 900	9 0 0 }		
900 } 1000	9 0 0 }		
Above 1,000 <i>l</i> . the old duty is about 1 <i>l</i> . per cent. up to 100,000 <i>l</i> ., at which sum the scale stops.		Exceeding 600 <i>l</i> . for every 100 <i>l</i> ., and also for any fractional part of 100 <i>l</i> . } 0 10 0	

Various modes of conveyance liable to ad valorem duties.—The terms descriptive of the mode of conveyance upon which the *ad valorem* duties will attach under the New Stamp Act (13 & 14 Vict. c. 97), are set out in the schedule, as—

Conveyance, whether grant, disposition, lease, assignment, transfer release, renunciation, or of any other kind or description whatsoever, upon the sale of any lands, tenements, rents, annuities, or other property, real or personal, heritable or moveable, or of any right, title, interest, or claim in, to, out of, or upon any lands, tenements, rents, annuities, or other property,⁽¹⁾ that is to say, for and in respect of the principal or only deed or instrument or writing, whereby the lands, or other things sold, shall be granted, leased, assigned, transferred, released, renounced, or otherwise conveyed to, or vested in the purchaser or purchasers, or any other person or persons by his, her, or their direction.

The consideration money must be truly stated in the conveyance.—The purchase or consideration money shall be truly expressed and set forth in words at length in the principal or only deed of conveyance; and if the consideration consists, either wholly or in part, of any stock or security, that the value thereof shall be ascertained and set forth in like manner in the conveyance.

Penalties for not setting forth consideration truly.—If the consideration is not truly set forth in accordance with the directions contained in the Stamp Acts (48 Geo. 3, c. 149; 55 Geo. 3, c. 184; 13 & 14 Vict. c. 97), both vendor and purchaser are subjected to a penalty of 50*l.*, and also to the payment of five times the amount of the duty beyond what was actually paid; but a purchaser has this advantage over a vendor, that although he shares with the latter in the burden of the penalties, he will be entitled to recover back from him so much of the purchase moneys as shall be untruly set forth in the conveyance: (48 Geo. 3, c. 149, ss. 22 and 23.)

Other parties liable to penalties for not truly setting forth consideration.—In addition to the vendor and purchaser,

⁽¹⁾ It has been recently held that the sale of the goodwill of a business for a pecuniary consideration requires an *ad valorem* stamp proportioned to the amount of the purchase money (*Attorney-General v. Potter*, 23 L. T. Rep. 269), but it seems that choses in action, such as bonds, judgment, or the like, do not come within the definition of other property, real or personal, mentioned in the schedule attached to the Stamp Acts, upon which an *ad valorem* duty becomes payable: (*Warren v. Howes*, 2 B. & C. 281; and see 6 *ib.* 234; 9 *ib.* 400; *Colwell v. Dewson*, 14 L. T. Rep. 468.)

the attorney, conveyancer, or other person preparing such deed in which the consideration is not truly expressed, will not only incur a penalty of 500*l.*, but also become disqualified to practice, or to hold any office. Similar penalties are also inflicted on stewards of manors and others for preparing copyhold assurances; and stewards and tenants of manors not actually preparing, but aiding and assisting in the passing of, any copyhold assurance wherein the true consideration is not set forth, are made liable to a fine of 50*l.* for every offence: (sects. 30 to 34.)

Consideration being untruly set forth does not invalidate the instrument.]—But notwithstanding the act (48 Geo. 3) inflicts severe penalties for not truly setting forth the consideration, the assurance itself will not be invalidated thereby: (*Robinson v. MacDonnell*, 5 Mau. & Selw. 234.)

No penalty will be incurred where the sum actually paid is truly expressed.]—And where the sum actually and *bonâ fide* paid is truly expressed, no penalties will be incurred, notwithstanding it should be less than the sum actually agreed upon, provided it be the true amount which is finally agreed to be paid, and which is actually paid accordingly, although in reality it should be proved that such reduction was made for the express purpose of evading the higher rate of stamp duty: (*Shephard v. Hall*, 3 Camp. N. P. C. 20.)

Ad valorem duties payable on the purchase of an equity of redemption.]—Where an equity of redemption is purchased, the mortgage debt is treated as part of the consideration upon which the *ad valorem* duty is to be paid. Thus, if a property is charged with a mortgage of 1000*l.*, and a purchaser buys the equity of redemption for 500*l.*, *ad valorem* duty will attach on both sums, and a stamp adapted to a conveyance in consideration of 1500*l.* must be employed accordingly. In a recent case (*Marquis of Chandos v. Commissioners of Inland Revenue*, 17 L. T. Rep. 128), the Court of Exchequer held that the mortgage debt was not to be considered as part of the purchase money, unless the purchaser covenanted to discharge it, and indemnify the vendor from all liability in respect of it, and was not to be so considered where the conveyance was altogether silent upon that head; but, very shortly after that decision, the statute (16 & 17 Vict. c. 59) was passed for the express purpose of altering the law in this respect, and by the 10th section of

which, after reciting that by the General Stamp Act (55 Geo. 3, c. 184), it is provided that where any property is sold or conveyed, subject to any debt or sum of money, to be afterwards paid by the purchaser, the same shall be deemed to be the purchase or consideration-money, in respect whereof the said *ad valorem* duty charged upon the sale and conveyance of property is to be paid; and also reciting that it had been held and determined that the said *ad valorem* duty is payable in respect of any such sum or debt only where the purchaser is personally liable or bound, or undertakes, or agrees to pay the same, or to indemnify the vendor against the same, and that it was expedient to amend the law in this respect, proceeds to enact that where any lands or other property shall be sold and conveyed subject to any mortgage, wadset, or bond, or any debt, or to any gross or entire sum of money, such sum of money or debt shall be deemed the purchase or consideration money, as the case may be, in respect whereof the said *ad valorem* duty shall be paid, notwithstanding the purchaser shall not be or become personally liable, or shall not undertake or agree to pay the same, or to indemnify the vendor or any person against the same, anything in any act or otherwise to the contrary notwithstanding.

Where the consideration is merely nominal.—Where the consideration is a mere nominal one, as 5s., 10s., or a pepper corn, or the like, which is expressed to be, but in fact never is paid, no *ad valorem* duty is chargeable; and if any other actual pecuniary consideration is paid, then no duty whatever will be paid in respect of such nominal consideration, but, if otherwise, the common deed stamp of 1l. 15s. will attach upon it.

Stamp duties chargeable where the consideration for the conveyance is an annuity or rent charge.—Where a conveyance is made in consideration of an annuity, the common deed stamp of 1l. 15s. would formerly have been sufficient to cover it: (*James v. Tetley*, 2 Bro. & Bing. 702; *Cumberland v. Kelly*, 3 Barn. & Adol. 607.) But by the recent act (17 & 18 Vict. c. 63), any conveyance (not being a lease or tack for years), where the consideration is an annual sum payable in perpetuity, or for any definite period, where the annual sum secured or made payable shall not exceed the sum of 20l., is charged with a duty of 2s. 6d.; and where the same shall exceed 20s., and shall not exceed 12l., then for every 20s. and fractional part of 20s. of such annual

sum, a duty of 2s. 6d. And where the same shall exceed 12*l.*, and shall not exceed 24*l.*, then for every 40*s.*, and fractional part of 40*s.* of such annual sum, a duty of 5*s.*; and where the same shall exceed 24*l.*, then for every 4*l.* and fractional part of 4*l.* of such annual sum, a duty of 10*s.* And by a still more recent enactment (17 & 18 Vict. c. 83), any conveyance, &c., described in the schedule annexed thereto shall be made partly in consideration of such annual sum, and partly in consideration of a sum of money or stock, such conveyance, &c. shall be chargeable with the *ad valorem* duties in respect of each of the considerations; and where any deed or instrument shall be chargeable with any *ad valorem* duty in respect of any sum of money yearly or in gross, or any stock or security herein mentioned shall be made, also for any further valuable consideration, such deed or instrument shall be chargeable (except where express provision to the contrary shall be made by any act of Parliament) with such stamp duty as any separate deed or instrument made for such last consideration only would be chargeable with, except progressive duty: (sect. 16.) And by the schedule annexed to the above-mentioned act, conveyances are charged with the same duties as on a lease for a term not exceeding one hundred years, at a yearly rent equal to such annual sum.

No ad valorem duties chargeable upon a covenant to lay out a specified sum in building or improvements.—No *ad valorem* duty will attach upon a covenant by which a lessee or a purchaser undertakes to lay out a specified sum in buildings or other improvements upon the demised or purchased premises: (*Nicholls v. Cross*, 14 Mees. & Wels. 42.)

As to assignments by sheriff, and conveyances by the assignees of bankrupts.—An assignment of property sold under an execution by the sheriff to the purchaser is liable to the same *ad valorem* duty as in ordinary sales (*Lessee of Nemgle v. Ahern*, 3 Ir. Law Rep. 31), as are also conveyances by the assignees of bankrupts or of insolvent debtors.

Where lands are contracted to be purchased by several persons.—Where lands or other property contracted to be purchased by two or more persons jointly, or by any other person for himself and others, or wholly for others at one entire price for the whole, shall be conveyed in parts or parcels by separate deeds or instruments for the persons for

whom the same shall be purchased, for distinct parts or shares of the purchase money, the principal or only deed of conveyance of each separate part or parcel shall be charged with the said *ad valorem* duty in respect of the sum of money therein specified as the consideration for the same; but if separate parts or parcels of such lands or other property shall be conveyed to, or to the use of, or in trust for different persons, in and by one and the same deed or instrument, then such deed or instrument shall be charged with the said *ad valorem* duty in respect of the aggregate amount of the consideration-moneys therein mentioned to be paid, or agreed to be paid, for the lands or property thereby conveyed to the purchaser: (55 Geo. 3, c. 184, tit. "Conveyance.")

When several parties sell at distinct prices, a stamp on the aggregate amount will be sufficient.—But where several parties sell at distinct prices, if they all convey to the purchaser by the same instrument, one stamp will cover the whole, without respect to the different estates and interests the conveying parties take in the property: (*ib.*)

As to sub-sales.—With respect to sub-sales, where any person having contracted for the purchase of any lands or other property, but not having obtained a conveyance thereof, shall contract to sell to any other person, and the same shall in consequence be conveyed immediately to the sub-purchaser, the principal or only deed or instrument of conveyance shall be charged with the said *ad valorem* duty in respect of the purchase or consideration therein expressed or agreed to be paid by the sub-purchaser: (55 Geo. 3, c. 184; tit. "Conveyance.")

As to sub-purchasers.—“And where any person, having contracted for the purchase of any lands or other property as aforesaid, shall convey the same in parts or parcels, the principal or only deed of conveyance of each part or parcel thereof shall be charged with the said *ad valorem* duty in respect only of the consideration-money paid for the same by the sub-purchaser, without any regard to the amount of the original purchase-money:” (*id. ib.*)

What persons are to be deemed purchasers and sellers.—In all cases of such sub-sales as aforesaid, the sub-purchasers and persons selling immediately to them, shall be deemed the purchasers and sellers within the meaning of

the Stamp Acts (48 Geo. 3, c. 149, and 55 Geo. 3, c. 148), with respect to the *ad valorem* duties thereby granted.

As to ad valorem duties where there has been an actual conveyance to the person immediately selling.]—But where any sub-purchaser shall take an actual conveyance of the interest of the person immediately selling to him, which shall be chargeable with the said *ad valorem* duty in respect of the purchase or consideration paid or agreed to be paid by him, and shall be duly stamped accordingly, any deed or instrument of conveyance to be afterwards made to him of the property in question by the original seller shall be exempted from the said *ad valorem* duty, but will nevertheless be chargeable with 1*l.* 15*s.* common deed stamp.

Additional stamp duties chargeable where the instrument contains anything beyond the conveyance.]—Where any instrument, operating as a conveyance on the sale of any property, shall operate as a conveyance of any other than the property sold, by way of settlement, or for any other purpose, or shall also contain any other matter or thing besides what shall be incident to the sale or conveyance of the property sold, or relate to the title thereto, every such deed or instrument shall be charged, in addition to the duty to which it shall be liable as a conveyance on the sale of property, and to any progressive duty to which it may also be liable, with such further stamp duty as any separate deed containing the other matters would have been chargeable with, exclusive of the progressive duty: (*ib.*)

Additional duties on freehold estates now abolished.]—In addition to the ordinary *ad valorem* duties on conveyances of freehold property transferring the immediate possession, an additional stamp duty was imposed, as on the deed of bargain and sale for a year, where the conveyance was by lease and release, or on the instrument of conveyance itself, where the assurance was by feoffment, or by deed of bargain and sale enrolled; but all these additional duties were abolished by the statute 13 & 14 Vict. c. 97, s. 7.

Where the consideration is a transfer of stock, mortgage, judgment, or debenture.]—No *ad valorem* duties were chargeable under the General Stamp Act (55 Geo. 3, c. 184), where the consideration for the purchase was a transfer of stock; but now, under the more recent enactment (13 & 14 Vict. c. 97), schedule CONVEYANCE, where the consideration

shall be stock in any of the public funds, or any government debenture, or stock of the Bank of England, or Bank of Ireland, or any debenture or stock of any corporation, company, society, or person or persons payable only at the will of the debtor, the said duty shall be calculated (taking the same respectively, whether constituting the whole or part of such consideration) according to the average selling price thereof respectively on the day or either of the ten days preceding the day of the date of the deed or instrument, of conveyance; or, if no sale shall have taken place within such ten days, then according to the average selling price thereof on the day of the last preceding sale. And if such consideration, or part of such consideration shall be a mortgage, judgment, or bond, or debenture, the amount whereof shall be recoverable by the holder, or any other security whatsoever, whether payable in money or otherwise, then such calculation shall be made according to the sum due thereon for both principal and interest.

Exchanges.—The act (13 & 14 Vict. c. 97) is altogether silent with respect to the stamp duties when the conveyance is made by way of exchange. Assurances of this kind, therefore, still remain within the operation of the General Stamp Act (55 Geo. 3, c. 184), under which they are chargeable with a duty of 1*l.* 15*s.* where no sum of money is paid, or only a sum under 300*l.*, by way of equality of exchange; but where a greater sum than 300*l.* is paid for such equality of exchange, then the same *ad valorem* duty is payable as on the conveyance on a sale of lands for a sum equal to the sum so paid or agreed to be paid, the amount of which will now be regulated by the new scale of duties imposed upon sales by the act 13 & 14 Vict. c. 97.

Power of attorney.—A power of attorney to execute a deed must be made by deed stamped with a 1*l.* 15*s.* stamp: (*White v. Cayles*, 8 T. R. 176.) But a power of attorney for the sale, transfer, or acceptance of stock, will be covered with a stamp duty of 1*l.*; the stamp duty on powers of attorney of every other kind is 1*l.* 10*s.*, with the exception of instruments of this kind, authorizing persons to receive prize money or seamen's wages, which are charged with a duty of 1*s.* only.

Revocation of power of attorney.—A power of attorney may be revoked by parol, in which case no stamp duty will attach, but if such power is revoked by deed, then a 1*l.* 15*s.*

common deed stamp will become necessary: (*Rez v. Went*, 1 Bing. 131.)

Attornment.—A simple act of attornment to the persons legally entitled to the reversion requires no kind of stamp whatever, an act of this kind not being deemed of sufficient importance to occupy a place in the Stamp Acts: (*Cornish v. Learall*, 8 B. & C. 471.) But if the amount of rent, or the time or manner in which it is to be rendered, is set forth in the attornment, it will then be viewed in the light of an agreement, and must be stamped accordingly: (*Frankis v. Frankis*, 3 Per. & Dav. 565.) And if an attornment is made to persons having no right to the property, such instrument will not be deemed evidence, unless it be stamped as an agreement: (*Frankis v. Frankis*, 3 Per. & Dav. 365.)

Ad valorem duty does not attach unless the instrument operates by way of conveyance.—No *ad valorem* duty will attach if the instrument does not operate by way of conveyance; hence it has been determined that an award, although under hand and seal, and conferring an interest in real estate, was properly stamped with the common 1*l.* 15*s.* deed stamp. And where an inclosure act gave the commissioners power to award lands to those persons who bought them of persons entitled to allotments, it was held that they might award lands partly by exchange and partly for money, and that the award did not require an *ad valorem* stamp on the consideration money, which greatly exceeded 300*l.*: (*Doe ex dem. Suffield v. Preston*, 7 B. & C. 392.) And upon the same principle, an agreement in consideration of 7,000*l.* to present to a rectory, was held not to be a conveyance chargeable with *ad valorem* duty, notwithstanding it was argued that a court of equity would have decreed the purchaser the next presentation, in the event of a vacancy: (*Wilmot v. Wilkinson*, 6 B. & C. 506.) So, where the plaintiff agreed to sell to the defendants all the two upper beds or veins of coal under certain lands containing sixteen acres, more or less, at 77*l.* per acre, to be paid as follows, viz., 100*l.* on the day of the date, and the other by equal quarterly payments of 25*l.* each; and it was also stipulated that if the defendants should work more of the coal in any year than 100*l.* the defendant shall pay for such excess quarterly, after the rate aforesaid; the court held, notwithstanding no further conveyance appeared to have been contemplated, and that the transaction amounted to a sale, still that the instrument did not fall within the description

of those charged with *ad valorem* duty: (*Phillips v. Morrison*, 13 L. J. Rep. (N. S.) 212.) Neither will an agreement for the vesture of land require an *ad valorem* stamp.

No ad valorem duty attaches unless there is an actual sale.]—Unless there is an actual sale, no *ad valorem* duty will attach. And where a contract has been entered into, and deed of conveyance prepared, duly stamped, but such contract is afterwards abandoned previously to the execution of the deed, in such cases the duties will be remitted, as they also will where the whole of the stamps have been spoiled, and in the latter case, without any reference as to whether the instrument to which they were attached shall have been exempted or not.

Deeds by way of family settlement not viewed in the light of sales.]—Settlements by way of family arrangement are not viewed in the light of sales; but instruments of this kind are chargeable with a particular amount of stamp duties, under the head of "Settlement," which will form subject-matter for our future consideration, when we come to treat of instruments of the latter kind: (*Dean v. Diamond*, 4 B. & C. 423.)

Duties now chargeable upon separate deeds of covenant.]—But now, separate deeds of covenant upon a sale or mortgage, whether to surrender copyholds, or for title, or to produce title deeds, or for any other purpose, require a duty equal to the *ad valorem* duty on the consideration money, where such duty does not exceed 10s., and 10s. where it exceeds that sum: (13 & 14 Vict. c. 97, schedule, "Covenant.")

II. PROGRESSIVE DUTIES.

Progressive duties, when and how chargeable.]—The progressive duties imposed by the General Stamp Act (55 Geo. 3, c. 184) upon conveyances charged with an *ad valorem* duty was 1l.; and where no such *ad valorem* duty was chargeable, but the instrument was liable to a duty of 1l. 15s., under the head of "Conveyance of any kind not otherwise charged, nor expressly exempted from all other stamp duty," the progressive duty was 1l. 5s. But now, under the recent act (13 & 14 Vict. c. 97, schedule, "Progressive Duty"), where any deed or instrument of any description, whether chargeable with any stamp duty, either

under this schedule, or under any act or acts now in force, together with any schedule, receipt, or other matter put or indorsed thereon, or annexed thereto, shall contain 2160 words or upwards (or thirty common law folios of seventy-two words each), then for every entire quantity of 1080 words (or fifteen common law folios contained therein over and above the first 1080 words, or fifteen common law folios) shall be charged the further progressive duty following (that is to say),

“Where such deed or instrument shall be chargeable with an *ad valorem* stamp duty or duties, not exceeding in the whole the sum of 10s., a further progressive duty equal to the amount of such *ad valorem* duty or duties.

“And in every other case (except where any other progressive duty is by this schedule expressly charged thereon), a further progressive duty of 10s.”

Progressive duties not chargeable where express provision is made for charging a certain duty.—But the act is not to extend to charge progressive duties in any case in which express provision is made for charging a certain duty, or to charge with progressive duty any instrument with any higher rate of progressive duty than was then chargeable on any instrument of the like description under the pre-existing Stamp Act.

Removal of doubts relating to the progressive duties on instruments referred to.—The act (13 & 14 Vict. c. 97) contains an important enactment for the removal of doubts relating to progressive duties to be charged on instruments in respect of other instruments duly stamped and referred to therein. This is contained in the 11th section, which after reciting that “by the several acts now in force relating to the stamp duties, as well as by this act, certain duties, called progressive duties, are imposed upon deeds and instruments, in respect of certain quantities of words contained therein, together with any schedule, receipt, or other matter put or indorsed thereon, or annexed thereto, and that doubts are entertained whether such progressive duties are chargeable on any deed or instrument in respect of the words contained in any other deed or instrument liable to stamp duty, and duly stamped, which may be put or indorsed upon, or annexed to, or referred to, in or by such first-mentioned deed or instrument, and that it is expedient to remove such doubts,” proceeds to enact, “that the said progressive duties shall not be deemed or held to be, or to

have been, imposed or chargeable upon any deed or instrument in respect of the words, or any quantity of the words contained in any other deed or instrument liable to stamp duty, and duly stamped, which may be, or may have been, put or indorsed upon, or annexed to such first-mentioned deed or instrument, or which may be, or may have been, in any manner incorporated with, or referred to, in or by the same.

Hardship of the existing law previous to the above enactment.—Previously to the above-mentioned enactment, parties, by annexing one instrument to another, frequently subjected themselves to an amount of stamp duty they never contemplated; for where a separate instrument duly stamped was annexed to and formed part of the latter, it was considered that it must be counted as part of the latter instrument, and be charged with stamp duty accordingly: (*Veale v. Nichols*, 1 Moo. & Rob. 284.)

Schedules, receipt, or other matters indorsed on, or annexed to the deed.—Every schedule, deed, receipt, or other matter, whether indorsed on the deed itself, or annexed thereto, will be counted in the number of words in casting up the folios, so that every inventory or catalogue that is attached to the deed will be counted as part of it, as will also the receipt clause, the signatures of the parties and witnesses, and the clauses of attestation: (*Lindley v. Clarkson*, 1 C. & M. 436; *Veal v. Nicholas*, 1 Man. & R. 248.) But the date and names of the parties, and the title of the deed indorsed thereon, will not be so counted: (*Winter v. Fearson*, 4 B. & C. 663.)

As to schedules, &c. referred to in deeds, but not annexed thereto.—Where any schedule, inventory, or catalogue, or the like, is referred to by any deed, but not indorsed upon or annexed thereto, such schedule, &c. will not be calculated in the folios of the deed, but a distinct duty will be attached upon it, under the head, "schedules, inventory, or catalogue." This duty, where the stamp duty on the instrument referred to does not exceed 10s., exclusive of progressive duties, is a duty of the same amount as that of the instrument so referred to. And where the duty on such instrument exceeds 10s., exclusive of progressive duty, then a 10s. stamp will attach, with a further progressive duty of the same amount as before charged thereon, for every additional

fifteen common law folios, where such schedule, catalogue, &c. exceeds thirty folios: (13 & 14 Vict. 97, schedule.)

One deed referring to another will not convert the latter into an inventory.]—One deed referring to the terms of another will not convert the latter into an inventory, so as to render it liable to stamp duties as such. Hence, where a lease was made of lands to be farmed according to a certain lease granted to other persons, it was held that the lease so referred to did not come within the description of "schedule, inventory, catalogue, &c." and therefore did not require to be stamped as such: (*Strutt v. Robinson*, 3 B. & Ald. 395.)

Want of stamp on inventory, &c. will not affect the former deeds to which it refers.]—The want of a proper stamp on schedule, inventory, or catalogue will affect that instrument only, and will have no effect on the deeds to which it refers: (*Duck v. Braddyll*, McClell. 217.)

III. DUTIES CHARGEABLE ON THE SURRENDER AND ADMITTANCE TO COPYHOLD OR OTHER CUSTOMARY ESTATES.

Purchaser of copyholds required to give a note in writing to steward specifying amount of purchase money.]—Where any copyhold lands are proposed to be surrendered in court, the person proposing to surrender the same shall deliver a note in writing to the steward, stating whether the supposed surrender is upon a sale or otherwise, and in the former case specifying the amount of the purchase moneys, to the intent that the same may be set out in words at length on the copy of court roll; and until such note or writing shall be delivered, the lord or steward shall not accept the proposed surrender on pain of forfeiting 50*l.*: (48 Geo. 3, c. 149.) A penalty of 50*l.* is also imposed upon the steward in case he should fail to set out the purchase money at full length upon the court rolls; and also subjecting the parties to a penalty of 100*l.* who, upon a sale of copyhold premises, shall, upon his note to be delivered as aforesaid, state the proposed surrender to be not upon a sale: (*ib.* sect. 30.)

Lords and stewards liable to penalties for enrolling surrenders not duly stamped.]—The lord or steward is also liable to a penalty of 50*l.* for enrolling surrenders made out of court, or bargains and sales, unless duly stamped (48 Geo. 3, c. 149, s. 31); as also for taking any surrender or admitting any person tenant to any copyhold premises out of court, or

making any voluntary grant of such lands out of court, or granting any licence to demise any such lands without causing the same, or some memorandum thereof respectively, to be put in writing on vellum, parchment, or paper, duly stamped with the proper duty: (*ib.* sect. 32.) Stewards of manors are also subjected to the like penalties for neglecting to make out and deliver copies of court roll within four calendar months to the parties entitled thereto: (*ib.* sect. 38.)

As to stamp duties on surrenders.—Surrenders, and other instruments relating only to copyhold or customary estates, whose yearly value should not exceed 20*s.*, were exempted out of the preceding duties thereby imposed upon the sale of lands by the General Stamp Act (55 Geo. 3, c. 184), but were thereafter charged with a duty of 1*l.* upon every surrender or admission, whether made in or out of court, where the yearly value exceeded the sum of 20*s.*, and where it did not exceed that sum, a duty of 5*s.*, with a progressive duty to the same amount for every additional fifteen common law folios after the first fifteen, where the instrument contained thirty of such folios or upwards.

Voluntary grants.—Voluntary grants made by the lord of any copyhold premises for a life or lives for a pecuniary consideration, and the copies of court roll of such grants, were also within the exceptions on conveyances under the General Stamp Act (55 Geo. 3, c. 184), but under the head of "Copyhold" in the schedule annexed to the said act, any such voluntary grant, or memorandum thereof, whether made in or out of court and with or without admittance thereon, where the yearly value did not exceed 20*s.* was charged with a duty of twice 1*l.*, and where it did not exceed 5*s.* with a duty of twice 5*s.*, and a progressive duty of 1*l.* in either case. But now, under the act 13 & 14 Vict. c. 97, schedule, "COPYHOLD ESTATES, and customary estates passing by surrender and admittance, or by admittance only and not by deed: INSTRUMENTS relating thereto upon the sale or mortgage of such estates (that is to say.)

"Any admittance out of court, or the memorandum thereof, or the copy of court roll of any admittance in court, a duty of 2*s.* 6*d.*," where the same does not amount to thirty common law folios, with a progressive duty of the same amount where it exceeds that limit.

Copyhold estates passing by surrender and admittance.—Copyhold estates passing by surrender and admittance, or

by admittance only and not by deed: INSTRUMENTS relating thereto not otherwise charged by the said act, when such surrender is made out of court, or the memorandum thereof, are still chargeable under the General Stamp Act (55 Geo. 3, c. 184) with a duty of 1*l.* where the same shall exceed 5*s.*, and a duty of 5*s.* where the same shall not exceed 20*s.*

Old duties of admittances out of court.—By the General Stamp Act (55 Geo. 3, c. 184), also, any admittance out of court, or the memorandum thereof, where the clear yearly value shall not exceed 20*s.*, is charged with a stamp duty of 1*l.*, and where the same shall not exceed 20*s.* with a duty of 5*s.* And where both a surrender and admittance, or more than one surrender or admittance, or other memorandum thereof, was contained in the same piece of vellum, parchment, or paper, the proper duty was payable in respect both of each surrender and of each admittance.

Alterations effected by the act 13 & 14 Vict. c. 97.—The only alterations which have been effected with respect to the stamp duties on copyholds is in those relating to “admittances out of court,” on the copy of court roll on an admittance in court *upon sale or mortgage*, which is reduced from 1*l.* or 5*s.* to a duty of 2*s.* 6*d.* in all cases.

Where surrenders are made of several tenements.—With respect to surrenders made of several copyhold tenements, it seems that if they are all described as forming the subject of one surrender only, or only one admittance, one stamp will cover the whole, provided one admittance only is necessary to perfect the title. But when several admittances are necessary, a separate stamp will be required on each admittance: *Roach v. Steward of Eton College*, 6 L. T. Rep. 395.)

Surrenders to the uses of a will exempt from stamp duty.—Original surrenders of copyholds out of court, and copies of court roll of surrenders in court to the uses of a will, or to trustees for the purposes of a will, as also the court rolls, or the books of any manor wherein the proceedings relating thereto shall be entered or minuted, are exempted from all stamp duty (55 Geo. 3, c. 184, sched., Copyhold); but under the Wills Act (1 Vict. c. 26, s. 4), where copyholds have not been surrendered to the use of a will, no person claiming under the will shall be entitled to be admitted tenant thereto without paying the same duties as if the testator himself had been admitted; and a proviso in the

same section, which empowers an unadmitted devisee to devise his estate, also enacts that no person claiming under such will shall be entitled to be admitted thereto, except upon payment of such stamp duties, fees, &c. as would have been lawfully due in respect of the admittance of the said testator and of surrendering the estate to the use of his will, or of presenting, registering, or enrolling such surrender, had he been duly admitted, and had surrendered the same to the uses of his will; all which said duties shall be paid in addition to the stamp duties, &c. due or payable on the admittance of the persons entitled as aforesaid.

As to deeds of covenant to surrender of copyholds.—No express mention is made of deeds of covenant, either for the surrender of copyholds or for any other purpose, either in the General Stamp Act (55 Geo. 3, c. 184) or in any other enactment relating to stamp duties, but such assurances were charged with a duty of 1*l.* 15*s.* under the head of "Conveyance not otherwise charged;" and are now, under the statute 13 & 14 Vict. c. 97, chargeable with a duty equal to the *ad valorem* duty on the consideration money where the duty does not exceed 10*s.*, and to a duty of 10*s.* where the same shall exceed that amount.

IV. ERRORS AND OMISSIONS, HOW REMEDIED.

1. Where the wrong stamps have been used.
2. Where the instruments are unstamped at the time of execution.
3. As to the stamping of instruments executed abroad.
4. Allowance for spoiled stamps, how obtained.
5. By whom the expenses of re-stamping instruments must be borne.

1. *Where the wrong Stamps have been used.*

Statutory enactments.—By the statute 43 Geo. 3, c. 127, re-enacted by the General Stamp Act (55 Geo. 3, c. 184), instruments requiring stamps of a particular denomination having wrong stamps affixed to them, but of equal or greater value, are allowed to be stamped with a proper stamp without the payment of any penalty. These acts are, however, superfluous so far as deeds or other instruments under seal are concerned, as these have never been marked with stamps of any specific character; consequently the same description of stamp, if of the proper value, is equally adapted to a conveyance, assignment, lease, mortgage, or any other kind of deed whatever.

Difficulties in deeds with respect to wrong stamps.—The difficulty with respect to deeds has been to determine the exact amount of duty the particular instrument requires, and where there are several instruments relating to the same transaction, to ascertain in respect of which of these the *ad valorem* duty is to be paid.

Errors in wrong stamps, how rectified.—To remove these doubts and difficulties, the General Stamp Act (55 Geo. 3, c. 184) authorized the parties themselves, where a doubt should arise amongst several instruments as to which of them was the principal, to determine the matter, and to pay the *ad valorem* duty thereon accordingly; and also, that if necessary, the other instruments on which the doubt should have arisen, should be stamped with a denoting stamp testifying the payment of the *ad valorem* duty. And now, under the recent Stamp Act (13 & 14 Vict. c. 97), when any instrument liable to stamp duty shall be presented to the Commissioners of Inland Revenue, at their office, upon payment of a fee of 10s. by the party presenting the same, the commissioners are required to assess the stamp duties, upon payment of which, or in case of an instrument insufficiently stamped, of such a sum as, together with the stamp duty already paid, will be equal to the assessed duties, and on payment also of the amount, if any, payable by way of penalty on stamping such instrument, they are empowered to stamp such instrument with the proper stamp denoting the amount of the duty so paid, and every instrument upon which the same shall be impressed shall be deemed to be duly stamped, and be received in evidence accordingly: (sect. 14.)

Advantages conferred by the latter enactment.—The latter enactment is a great improvement upon the pre-existing law under the General Stamp Act (55 Geo. 3, c. 184), for under that act parties preparing deeds were often at a loss to find out what stamp they ought to employ, as also to ascertain, when any special clauses were inserted in a deed, whether such clauses could be treated as connected solely with the purchase and conveyance of the property, or as introducing fresh matter requiring additional stamp duty, and thus, on the one hand, from a superabundance of caution, an extra as well as unnecessary expense was incurred by using more stamps than were requisite, or, on the other hand, penalties might be incurred, and the instrument itself become inadmissible in evidence, for want of being impressed with a

sufficient number of stamps. These evils have been greatly remedied by the clause in the Act of Victoria above mentioned; and the small extra cost of 10s. is amply compensated for by the removal of all doubt and anxiety as to the sufficiency of the stamps to be employed in any transaction.

Parties dissatisfied with the commissioners' decision may appeal to the Court of Exchequer.—Parties dissatisfied with the determination of the commissioners as to the stamp duties chargeable, may, upon depositing with the commissioners the sum of 40s. for costs, appeal to the Court of Exchequer, and the duty will then be paid according to the decision of that court; and if it shall appear that no excess of duty or penalty shall have been paid by the appellant, the 40s. deposited for costs shall be applied for the use of Her Majesty's revenue; but if such excess as aforesaid shall appear to have been paid by the appellant, then the same, together with the 40s. deposit, shall be repaid him; and if the sum paid for stamp duty or penalty shall fall short of the amount which, according to the decision of the court upon such appeal, ought to have been paid, such deficiency shall be paid by the appellant, and the court will enforce such payment accordingly: (sect. 15.)

2. *Where the Instruments are Unstamped at the time of execution.*

Commissioners of Stamps and Taxes compelled to stamp instruments on payment of stamp duties and penalties.—Prior to the recent Stamp Act (13 & 14 Vict. c. 97), it was discretionary with the commissioners to stamp or not any deed or other instrument that was unstamped at the time of its execution (*Rippener v. Wright*, 2 B. & A. 478), but as the revenue was benefited by their compliance, they rarely, if ever, refused to do so, on the stamp duties and penalties being tendered to them; and now, by the 12th section of the act of 13 & 14 Vict. c. 97, the commissioners are compelled to stamp on payment of the penalties and duties.

Alterations affected in amount of penalties.—By the latter enactment, the penalty upon stamping instruments is increased from 5*l.* to 10*l.*, and where the amount of stamp duty required to be impressed exceeds 10*l.*, then an additional penalty of 5*l.* per cent. per annum, to be calculated from the date or first execution of the instrument. The object of this additional duty in the shape of a percentage is

to check a practice sometimes adopted, of deferring the stamping of instruments until actual proof of them was required, and then to get the stamp impressed on payment of the penalty and duty at any distance of time, without any increased penalty being thereby incurred.

Commissioners authorized to remit penalties.—The commissioners are empowered to remit the penalty within twelve calendar months after the execution of the instrument, where the circumstances are such as seem fairly to authorize such remission : (sect. 12.)

3. *As to the Stamping of Instruments executed Abroad.*

Powers of commissioners as to stamping of instruments executed abroad.—The 13th section of the act 13 & 14 Vict. c. 97, authorizes the Commissioners of Inland Revenue to direct that any instrument executed abroad may be duly stamped upon payment of the proper stamp duty, and without any penalty, provided that such instrument is brought to them for that purpose within the space of two calendar months from the time the same shall have been received in the United Kingdom.

Instruments executed in the United Kingdom must be stamped, although they relate to property abroad.—If the instrument is made in the United Kingdom, it is immaterial whether it relates to property at home or abroad, as the like amount of duties will attach in either case : (*Stonelake v. Bubb*, 5 Bur. 2675.) But instruments, if stamped in pursuance of the Stamp Acts in this country, may be given in evidence, although not stamped according to the laws of a foreign state in which they happen to have been made, it being a well established rule of law that our courts take no notice of the revenue laws of a foreign independent state : (*Holman v. Johnson*, Cow. 341 ; *James v. Catherwood*, 3 Dow. & Ry. 190.)

4. *Allowance for Spoiled Stamps, how obtained.*

Statutory provisions relating to spoiled stamps.—The statute (5 Geo. 3, c. 46) provided that persons having any stamped writing inadvertently spoiled before the same is executed, may bring the same to the head office, and upon making the required oath, the commissioners will stamp the like quantity of paper with same duties as the spoiled

stamps without taking money or any other consideration (sect. 39), which provisions were by the act (44 Geo. 3, c. 98) extended to stamps which shall have been spoiled, whether the instrument shall have been executed or not: (sect. 217.) The statute (50 Geo. 3, c. 35), also empowers the commissioners, where wrong stamps have been inadvertently used, to allow the same as spoiled, and to cancel such stamps and give others of equal value, provided application was made for relief within two calendar months after the date of the instrument, which period was afterwards extended to six months by the General Stamp Act (55 Geo. 3, c. 184), by which the powers of the commissioners to make allowance for spoiled stamps was greatly extended: (see sect. 11.)

Money may be returned for spoiled stamps.—None of the above-mentioned enactments, however, allowed the commissioners to return the money paid for spoiled stamps; all they were able to do was to give other stamps in lieu of them; but by a more recent enactment (3 & 4 Will. 4, c. 97), wherever the commissioners are authorized to cancel spoiled stamps, and to make allowance by giving others in lieu of them, they are thereby empowered, instead of giving the stamps, to repay the party the amount thereof in money, deducting per centage as allowed on the purchase of stamps of the same description; and also to repay to any person possessed of stamps not spoiled or rendered useless or unfit for the purpose intended, but for which he shall have no immediate occasion, the amount of such stamps in money, deducting such percentage upon his delivering up such stamps to be cancelled, and proving to the satisfaction of the commissioners that the same were purchased by him with a *bonâ fide* intent to use the same, and that he has paid the full amount denoted by such stamps without deduction, save only such percentage as aforesaid, and further, that such stamps were so purchased within three calendar months next preceding, at the head office at Westminster or Edinburgh, or from some distributor or sub-distributor duly appointed, or some person licensed under the act to deal in stamps: (sect. 19.)

Allowance for spoiled stamps, how obtained.—Formerly the allowance for spoiled stamps could only be obtained at the head office in London, but latterly arrangements have been made for transacting this business in most of the large towns in the country, by which the distributor of stamps in

those localities is authorized to administer the oath, and receive the spoiled stamps, and transmit the same to the head office for allowance.

Course of proceeding to obtain the allowance for spoiled stamps in London.—The proper course of proceeding in London, in order to obtain the allowance of a spoiled stamp, is for the party claiming such allowance to attend at the head office on some day appointed for business of this description, and produce the stamp, and make or deliver an affidavit in the form required by the Board; when, if this allowance is granted, a ticket is issued to the party, entitling him to another stamp of the same value. If the party himself attends, a form of affidavit is filled up by the proper officer, and he is sworn before a commissioner, who sits apart from the board for the purpose of attending to applications relating to spoiled stamps: (Tilsley on Stamp Laws, 573, 2nd edit. Chitt. 291.)

Course of proceeding where the party himself does not attend.—Where the party does not himself attend, he must make the necessary affidavit (which in this case is chargeable with a stamp duty of 2s. 6d.) before a Master in Chancery ordinary or extraordinary in England, or a Commissioner of the Court of Sessions or Exchequer in Scotland: (*ib. id.*)

Days appointed for the allowance of spoiled stamps.—In London the days are Tuesdays, Thursdays, and Saturdays, between the hours of twelve and two, for the attendance of parties to make affidavits and obtain allowance thereon; the alternate days are those on which affidavits are sent from the country, and the stamps to which they refer are received for examination. To the parties bringing the latter are delivered tickets to be exchanged on the Monday following for others, authorizing the receipt of fresh stamps where the application is granted.

As to the practice for obtaining allowance from distributors of stamps in the country.—In the country, no particular days are fixed for the allowance of spoiled stamps, but attendance is given every day in the week for this purpose, at the office of the distributor, during the usual hours of business, such distributor being authorized to administer the oath, transmit the spoiled stamps to the chief office in London, for allowance, and to deliver other stamps of the same value in lieu thereof to the claimant; but the commissioners have not, it seems,

authorized distributors in the country to return any money for spoiled stamps; their instructions being limited to the giving stamps of the same amount in value as the spoiled stamps for which they are substituted.

Course of proceeding to obtain allowance.—The course to be pursued, in order to obtain the allowance for a spoiled stamp in the country, is for the claimant to appear in person at the office of the stamp distributors for the district authorized to make such allowance, and there produce, within the usual hours of business, the spoiled stamp before the distributor, who will thereupon deliver a printed form of affidavit to the claimant for him to fill up, which being done, the distributor will give a voucher for the receipt to the claimant, and the affidavit, with the spoiled stamp, will then be transmitted by the distributor to the chief office in London; and if, upon examination at that office, the claim is allowed, a warrant will be issued to the distributor to issue the substituted stamps on presentation of the voucher. No stamp is required on affidavit for allowance before a distributor in the country; but the claimant will have to pay the value of the paper or parchment upon which the substituted stamps are impressed.

Requisites to be attended to for obtaining allowance.—On seeking for the above allowance the following requisites must be carefully attended to:

1. The application must be made in person.
2. The claim, in case the stamps are upon spoiled instruments, must be made within twelve months, and if upon executed instruments, within six months after they shall have been signed, excepting deeds requiring enrolment, and which have become void for want of such enrolment, the latter of which must be claimed within six calendar months after they shall have become so void as above mentioned. The claim for the allowance upon a deed sent abroad may be made within six months after it has been received back again in this country.
3. The voucher must be presented to the distributor within the space of six weeks after its delivery, otherwise the substituted stamps will not be allowed.

5. By whom the Expenses of re-stamping Instruments must be borne.

Expenses of documents improperly stamped must be borne by vendor.—In case, upon the investigation of a title as

between vendor and purchaser, any of the title deeds or other documents should turn out to be improperly stamped, the vendor is bound to get the proper stamps affixed to them at his own expense.

Responsibility of solicitors who allow instruments to be improperly stamped.]—But if any deeds are improperly stamped through the default or negligence of a solicitor, then the latter will be bound to make good the loss to his client; and it seems that, whenever improper stamps have been affixed to an instrument through such default or negligence on the part of a solicitor, the latter will be bound to make good all loss incurred by the party prejudiced thereby: (*Guilliam v. Burrett*, 2 Smith, 156.) Still, it seems that the solicitor might avail himself of the Statute of Limitations, in defence to a claim of this nature, where the act of negligence complained of has been incurred for six years or upwards, and which will begin to run from the time of the act committed, without reference to that when the mistake or defect was discovered or the penalties paid. Nor, it seems, will the court, where an action of this kind is brought against an attorney or solicitor by his client, exercise a summary jurisdiction on its officer by restraining him from pleading the Statute of Limitations in defence to such action: (*Re J. H. Tristan*, 15 L. T. Rep. 70.)

CHAPTER VI.

REMEDIES FOR BREACH OF CONTRACT.

- I. OF THE VARIOUS REMEDIES FOR BREACH OF CONTRACT.
- II. OF THE VENDOR'S REMEDIES IN THE COURTS OF COMMON LAW.
 1. Assumpsit for the purchase money.
 2. Action for use and occupation.
 3. Action for slander of title.
 4. Proceedings under the Common Law Procedure Act.
- III. OF THE PURCHASER'S REMEDIES IN THE COURTS OF COMMON LAW.
- IV. REMEDIES IN EQUITY.
 1. Of the various remedies to be obtained in equity.
 2. Proceedings by bill.
 3. Proceedings by claim under the new orders.
 4. Special case.

- I. OF THE VARIOUS REMEDIES FOR BREACH OF CONTRACT.

If the vendor or the purchaser fails or refuses to perform his part of the contract, the other party has a remedy against the defaulter, either by an action at law for damages, or in a court of equity for a specific performance; but no redress could, until recently, have been obtained in a court of law beyond damages for the non-performance, giving, in fact, the defaulting party an option either to pay damages, or perform the contract. In the latter respect, however, great alterations have been recently effected by the Common Law Procedure Act (17 & 18 Vict. c. 125), by which it is enacted that the plaintiff in any action in any of the superior courts, *except replevin and ejectment*, may obtain a peremptory *mandamus*, commanding the defendant to fulfil the contract, which will be granted, as well when the contract relates to real, as to personal property: (*ib.* sect. 68.) In

addition to which, he may also obtain an injunction against the repetition or continuance of such breach of contract, and also in the same action include a claim for damages or other redress.

Vendor's remedies at law.]—A vendor's legal remedies are: By action of assumpsit for the purchase money; and where a certain sum is stipulated to be paid by way of liquidated damages, he may recover such stipulated amount in an action of debt; and if, as sometimes happens, the contract for purchase is under seal, then an action of covenant will be his proper remedy. The latter form of action he may bring against either the real or personal representatives of the purchaser, in case of the death of the latter pending the contract; but if the agreement be merely under hand, his remedy is confined to the personal representatives only. A vendor may also maintain an action for use and occupation against a purchaser who has been let into possession of the premises, who retains such possession after the contract goes off, without any default on the vendor's part; but only from the time when such contract was determined (*Howard v. Shaw*, 8 Mees. & W. 118), but not for any previous occupation: (*Kirtland v. Pounsett*, 2 Taunt. 145.) And in addition to the above-mentioned remedies, by stat. 17 & 18 Vict. c. 125, the vendor may, as we have just before mentioned, by means of a writ of mandamus, procure a specific performance of the contract. And if a vendor has been prevented from selling his property, on account of his title having been slandered, he may bring his action on the case against the slanderer for consequential damages.

Vendor's right of action not affected by stipulation that deposit shall be forfeited by breach of contract.]—The vendor's right of action will not be taken away by a stipulation that if the purchaser shall fail to comply with the conditions, his deposit shall be forfeited as liquidated damages: (*Iceley v. Grew*, 6 Nev. & Man. 467.)

Vendor cannot maintain ejectment without notice.]—Where a purchaser has been let into possession by the vendor, the latter cannot, in the absence of an agreement to quit in some specified event, which has happened, bring ejectment against the purchaser without previous notice: (*Doe v. Seyer*, 3 Camp. N. P. C. 8; *Right v. Beard*, 13 East, 210.)

Purchaser's remedies at law.]—The legal remedies of a

purchaser are by special action on the contract; for money had and received to recover the deposit; assumpsit on debt, where the parties bind themselves to pay liquidated damages or moneys by way of penalty in default of fulfilling the contract, as also an action of covenant if the agreement is under seal. And in like manner with a vendor, he is entitled to a peremptory mandamus to enforce the contract in specie under the Common Law Procedure Act, 17 & 18 Vict. c. 123. Added to which remedies, a purchaser may also maintain an action on the case, in the nature of deceit, where vendor has made any fraudulent misrepresentation or concealment, by which the former has been deceived as to the true nature of the property.

II. OF THE VENDOR'S REMEDIES IN THE COURTS OF COMMON LAW.

1. Assumpsit for the purchase money.
2. Action for use and occupation.
3. Action for slander of title.
4. Proceedings under the Common Law Procedure Act.

1. *Assumpsit for the Purchase Money.*

Requisites to support the action.—If the vendor brings an action of assumpsit against the purchaser for the recovery of the purchase money, he must prove a valid agreement within the Statute of Frauds, and duly stamped as such, otherwise it cannot be admitted in evidence, nor can any secondary evidence be received of its contents; unless, indeed, the instrument happens to be in the hands of the opposite party, who, upon notice, refuses to produce it, in which case evidence of the latter description may be received: (*Garnons v. Swift*, 1 Taunt. 507.) If the only executed copy of the agreement is in the hands of the defendant (*Blakey v. Porter*, 1 Taunt. 386), or of a third party (*Gigner v. Bailey*) either party can as of course procure an order before trial for its previous production, for the purpose of its inspection, and its being stamped, if the latter be not already done. But where two original copies are retained, one by each party, the party who loses his copy cannot at law compel the other party to produce his copy at the trial, for the purpose of inspection: (*Street v. Brown*, 6 Taunt. 302.) The vendor must also prove the performance of all conditions precedent on his part, or a tender so to do, and a refusal on the part of the defendant (*Jones v. Barclay*, Doug. 684); the defendant's default; and

that the plaintiff has a good title to the property contracted for.

What acts of plaintiff will be considered as equivalent to performance.—But notwithstanding the general rule that a plaintiff, in order to support this action, must prove a performance of all conditions precedent, still, where the defendant himself prevents such performance, then what the law considers a performance will suffice; as, if a vendor tenders a conveyance, and a purchaser refuses to receive it; for a tender and refusal is deemed equal to a performance, but a tender without refusal is not so considered; both the tender and refusal must therefore be averred in the declaration, and proved at the trial: (*Jones v. Berkeley, supra; Wilmot v. Wilkinson*, 6 B. & C. 506.)

Plaintiff must show a good title.—The plaintiff must also show that he has a good title to the property. It is not sufficient for him to allege that he has been *always ready and willing*, and frequently offered to make a good title on payment of the purchase-money (*Phillips v. Fielding, supra*), he must aver that he actually made a good title, or a tender and refusal, and he ought to show what title he has: (*ib.*) But where the plaintiff alleged, in his declaration, that he was seised in fee of the lands in question, and that the defendant agreed to purchase *on having a good title*, and then averred that the title to the land *was made good, perfect, and satisfactory* to the defendant, it was holden that it was not necessary for the plaintiff to set forth in the declaration all the particulars of his title, and that the averments in the present case were sufficient to enable the plaintiff to call upon the defendant for the execution of his part of the agreement: (*Martin v. Smith*, 6 East, 555.)

Evidence of title.—Where the plaintiff produces his title deeds in support of his title, it does not appear to be satisfactorily determined whether the fact of the execution should be proved by the subscribing witnesses: (*Thompson v. Miles*, 1 Esp. N. P. C. 185; *Crosby v. Percy*, 1 Camp. N. P. C. 304.) It seems, however, to be settled that, if the purchaser has not made an application for the title before the commencement of the action, he will not be allowed to set up a want of title in the plaintiff, although the plaintiff could not have conferred it till after the action brought, it having been solemnly adjudged that, if a party sells an estate without having a title, but before he is called upon

to make a conveyance he gets such an estate as will enable him to make a title, it is sufficient: (*Thompson v. Miles, supra*; *Wilde v. Forte*, 4 Taunt. 336; *Bartlet v. Tuchin*, 7 Taunt. 259.)

Defence.—The most common defence to this action is defect of title in the vendor, under which defence equitable, as well as legal, objections may be taken; nor will the plaintiff be entitled to recover, unless he can show a good equitable as well as legal title to the property: (*Elliott v. Edwards*, 3 Bos. & Pull. 181; *Maberley v. Robins*, 5 Taunt. 625.) Nor, where the property is leasehold, can a vendor support this action, unless he can show a good title in his lessor: (*Souter v. Drake*, 5 B. & Ad. 992.) Refusal on the part of the vendor to convey will also form a sufficient answer to this action. Another ground of defence is that there has been a fraudulent misdescription by the vendor either as to extent or value, or in both particulars; or that the property is subjected to burdens and outgoing, or clogged with covenants or conditions not mentioned in the contract or conditions of sale; or that there has been a fraudulent concealment of defects, with the express view of deceiving the purchaser; or that, subsequently to the contract, the property has undergone some material alterations by the act of the vendor, of which no notice has been given to the purchaser, or which has even been unnoticed in the contract or conditions of sale; any one of which circumstances is a bar to the action. So the fact of a life having dropped, in the case of a sale of leaseholds determinable on lives, unnoticed in the conditions of sale, will afford sufficient ground for rescinding the contract, notwithstanding the auctioneer may have mentioned that circumstance at the time of sale; for the written conditions are the terms by which the sale is to be governed, and cannot be varied by parol declarations (see *ante*, p. 25.) The other defences usually set up are, that the plaintiff has, subsequently to the contract, and before any breach thereof, effectually released the defendant from the same; but this, it seems, according to high authority, can only be done by writing (*Sug. Vend.* 314), but in this respect the law does not appear to be satisfactorily settled, and it has been urged that the Statute of Frauds merely takes away the remedy by action in the case of a verbal contract, but is silent as to anything affecting the common law right of waiving by word of mouth a contract not under seal: (see *Goss v. Lord Nugent*, 5 B. & Ad. 58, 66; *Harvey v. Grabham*, 6 Nev.

& Man. 754, 762; *Stead v. Dawber*, 10 Ad. & Ell. 57, 65.) Another defence sometimes set up is that the contract has, before any breach of it by the defendant, been abandoned or waived by mutual consent; but it is doubtful whether such a defence would be available at law unless in writing; and according to one of our best legal authorities (see Lord St. Leonard's Concise View of the Law of Vendors and Purchasers, 114), although "a good defence in equity, it is doubtful whether such a defence is available in law, and perhaps the better opinion is that it is inadmissible at law." Still, in a late case, also referred to by the same noble and learned author, pp. 104, 114 (*Goss v. Lord Nugent*, 2 Nev. & Man. 33, 34), the Lord Chief Justice, in delivering the opinion of the court, observed that by the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time it was in a state of preparation, so as to add to, subtract from, or in any manner to vary or qualify, the written contract; but, after the agreement has been reduced into writing, it is competent for the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary or qualify, the terms of it, and thus to make a new contract, which is to be proved partly by the written agreement, and partly by the subsequent verbal terms ingrafted upon what will be thus left of the written agreement. It seems impossible to reconcile the opinion of the Lord Chief Justice with that expressed by Lord St. Leonards, and in this uncertain state the law remains. Thus much, however, is certain, that if the contract is entered into by deed under seal, it can only be discharged by deed under seal also: (*Jones v. Berkeley*, Doug. 659; *Laird v. Prim*, 7 Mees. & Wels. 474.)

Satisfaction.—It appears also that the acceptance by the plaintiff of something in satisfaction for the breach (*Willoughby v. Backhouse*, 2 B. & C. 821; *Baylis v. Usher*, 4 Moo. & Pay. 791), or his having already recovered damages in another action on the agreement, will be a sufficient defence: (see Bing. 538.)

Statute of Limitations.—The Statute of Limitations will also be a good bar to all actions for breach of contract.

2. Action for Use and Occupation.

Requisites to support action.—To support this action the plaintiff must show that the occupation was subsequent to the termination of the contract; that such contract was determined without any default of the vendor, and for what period of time from such termination of the contract the premises were so occupied by the defendant.

When a vendor may be restrained by a court of equity from proceeding at law.—When a bill for a specific performance is dismissed for defect of title in the vendor, a court of equity will generally grant an injunction to restrain a vendor from proceeding by action at law for the breach of contract: (*McNamara v. Arthur*, 2 Ball & Beat. 349.) Still, this will not in every instance be granted, as cases may occur in which, although the court declines to enforce a specific performance, yet, while it dismisses the bill, the decree expressly declares that it shall be without prejudice to the vendor's legal remedy, where it appears to the court that he has a legal remedy to resort to: (2 Ball & B. 353.)

When equity will compel a plaintiff to elect between his legal and equitable remedies.—When a plaintiff is proceeding, both in a court of law and a court of equity, for the same subject matter, equity will compel him to elect between his remedies; but equity will not restrain a plaintiff in a suit for a specific performance for bringing an action for the deposit, except, perhaps, upon the terms of bringing the deposit into court: (*Annesley v. Muggridge*, 1 Mad. 593.)

3. Action for Slander of Title.

When action will lie.—A vendor may bring an action against any person who, by slandering his title, prevents him from selling his property; as by stating that the issue in tail, or any person through whom the title is derived taking the lands by descent, is a bastard, who, if such statements were true, would be incapable of inheriting the estate: (3 Bla. Com. 123; Cro. Jac. 213; *Low v. Harewood*, Sir W. Jones, 196.)

Requisites to support an action for slander of title.—To support this action, it is incumbent on the plaintiff not only to state, but also to prove, the speaking of the words, and the particular injury he sustained in consequence; for the

damage sustained is the gist of the action, and not the speaking of the words, for the words alone are not in themselves the subject-matter of an action : (*Watson v. Reynolds*, 1 Mood. & Malk. 1.) Malice, either expressed or implied, must also be shown ; for if a person, thinking he had a right to the property, were to assert that claim, which in fact turns out to be unfounded, such an assertion, however publicly made, will not support an action of this kind : (*Smith v. Spooner*, *sup.*) Neither is the attorney of a person claiming title to premises put up for sale liable to an action for slander of title, if he *bonâ fide*, although without authority, makes such objections to the vendor's title, as his principal, if present, would have been authorized to make : (*Watson v. Reynolds*, *sup.*)

4. Proceedings under the Common Law Procedure Act.

Plaintiff authorized to proceed under, in any action except ejectment and replevin.]—It is by the 68th section of the Common Law Procedure Act (17 & 18 Vict. c. 125) enacted, that the plaintiff in any action in any of the superior courts, except replevin and ejectment, may indorse upon the writ and copy to be served a notice that the plaintiff intends to claim a writ of mandamus, and the plaintiff may thereupon claim in the declaration, either together with any other demand which may now be enforced in such action, or separately, a writ of mandamus commanding the defendant to fulfil any duty in the fulfilment of which the defendant is personally interested.

Declaration.]—The declaration, in proceedings of this kind, shall set forth sufficient grounds upon which such claim is founded, and shall set forth that the plaintiff is personally interested therein, and that he sustains or may sustain damage by the non-performance of such duty, and that performance thereof has been demanded by him and refused and neglected : (*id.* sect. 69.)

Pleadings.]—The pleadings and other proceedings in any action in which a writ of mandamus lies are the same in all respects, as nearly as may be, and costs shall be recoverable by either party, as in an ordinary action for the recovery of damages : (*id.* sect. 70.)

Judgment.]—In case judgment shall be given for the plaintiff that a mandamus do issue, it shall be lawful for the

court in which such judgment is given, if it shall see fit, besides issuing execution in the ordinary way for the costs and damages, also to issue a peremptory writ of mandamus to the defendant, commanding him forthwith to perform the duty to be enforced: (*id.* sect. 71.)

Form of peremptory writ.—The writ need not recite the declaration or other proceedings, or the matter therein stated, but shall simply command the performance of the duty, and in other respects shall be in the form of an ordinary writ of execution, except that it shall be directed to the party and not to the sheriff, and may be issued in term or vacation, and returnable forthwith; and no return thereto, except that of compliance, shall be allowed, but time to return it may, upon sufficient grounds, be allowed by the court or a judge either with or without terms.

Injunction.—The Common Law Procedure Act entitles the party injured or liable to be injured to claim a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract or injury of a like kind arising out of the same contract, or relating to the same property or right; and he may also, in the same action, include a claim for damages or other redress: (17 & 18 Vict. c. 125, ss. 79, 82.)

In what cases an injunction will be granted.—This writ may be sued out for the purpose of preventing any injury or mischief to the subject-matter of contract, for which a court of equity would, under similar circumstances, have interfered in a similar manner to prevent such acts, as, for example, to prevent the cutting down of timber, or the commission of any waste, destruction, or despoliation of the premises.

Course of proceedings.—The writ of summons in this action shall be in the same form as the writ of summons in any personal action; but on every such writ, and copy thereof, there shall be indorsed a notice that, in default of appearance, the plaintiff may, besides proceeding to judgment and execution for damages and costs, apply for and obtain a writ of injunction: (*id.* s. 80.) The proceedings in such action shall be the same, as nearly as may be, and subject to the like control, as the proceedings in an action to obtain a mandamus under the provisions hereinbefore contained, and in such action judgment may be given that a writ of injunction do or do not issue, as justice may require;

and in case of disobedience, such writ of injunction may be enforced by attachment by the court, or, when the court shall not be sitting, by a judge: (*id.* s. 81.)

Application for the writ after action commenced.]—It shall be lawful for the plaintiff, at any time after the commencement of the action, and whether before or after judgment, to apply *ex parte* to the court or a judge for a writ of injunction to restrain the defendant in such action from the repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract of a like kind arising out of the same contract, or relating to the same property or right, and such writ may be granted or denied by the court or judge, upon such terms as to the duration of the writ, keeping an account, giving security, or otherwise, as to such court or judge shall seem reasonable and just; and in case of disobedience, such writ may be enforced by attachment by the court, or when such court shall not be sitting, by a judge; provided always, that an order for a writ of injunction made by a judge, or any writ issued by virtue thereof, may be discharged or varied, or set aside by the court on application made thereto by any party dissatisfied with such order: (*id.* s. 82.)

III. OF THE PURCHASER'S REMEDIES IN COURTS OF COMMON LAW.

Special action on the case.]—To maintain this action, the plaintiff must prove the performance on his part of all conditions precedent, and the refusal or incapacity of the defendant to fulfil the contract.

Evidence.]—The contract must be proved in the manner we have already mentioned (*ante*, p. 289), and must also prove the performance of all conditions precedent on the part of the plaintiff; consequently, as it is the duty of the purchaser to prepare and tender the conveyance to the vendor for execution, he cannot maintain this action without proving that he has either done this, or that his doing so would have been merely nugatory; as, where a vendor has incapacitated himself from completing the contract by conveying the property to some other party (*Knight v. Crockford*, 1 Esp. N. P. C. 190), or is unable to make a marketable title to it (*Roper v. Coombes*, 6 B. & C. 534), in either of which cases it would not only have been unnecessary, but even improper, to have made such tender: (*Hodges v. Lord Lichfield*, 1 Bing. N. C. 492; *Jarman v. Eggleston*, 5 Car. & Pay. 172.)

No defence to action that purchaser was not ready with his purchase money.]—Where the vendor is unable to make a good title by the day appointed, it will be no ground of defence on his part that the purchaser was not at that time prepared to pay the purchase money (*Clark v. King*, 1 Ry. & Moo. 394), for the vendor must be prepared to make out a good title on the day when the purchase is to be completed; and if he fails to do so, the purchaser will thereupon be entitled to vacate the agreement, and to bring his action for the breach. Still, to maintain this or any other action for such breach of contract, he must disaffirm the agreement *ab initio et in toto*, for if he takes possession under it he will be treated as having adopted it; and cannot afterwards disaffirm it by quitting the premises.

What will be considered a bad title.]—To support this action on account of a defective title in the vendor, he must prove the title to be actually bad, for the mere opinion of conveyancers to that effect will be insufficient: (*Camfield v. Gilbert*, 4 Esp. N. P. C. 140.) A contract to make a good title means a good title both at law and in equity, and therefore the court will inquire collaterally whether the title be good in equity: (*Maberly v. Robins*, 5 Taunt. 625.) Still, what is the meaning of a good title, notwithstanding the oft-repeated decisions, is a question that is by no means clearly settled; for in a late case (*Jeakes v. White*, 18 L. T. Rep. 49), we find the Court of Exchequer equally divided upon it, although three of the judges adhered to this definition of it, viz., “that where a question arises between vendor and vendee, or persons who are agreeing together in any way to form that relation between themselves, the meaning of a good title, a sufficient title, is this—such a title as the Court of Chancery would adopt as sufficient ground for compelling a specific performance; and where a person stipulates to have a good title, he does not mean merely that sort of title which would be good as against a stranger, nothing else appearing to justify a verdict in an action of ejectment, but such a title as would enable him to hold against all persons who probably might come to claim a right to it.

Plaintiff cannot, at trial, insist upon objections which he neglected to make when he rescinded contract.]—A plaintiff cannot, at the trial, insist upon any objection to the title appearing on the abstract which he neglected to take at the time of rescinding the contract, and which might possibly

have been removed by the vendor if taken before: (*Todd v. Hoggart*, 1 M. & M. 128.) The plaintiff must also give a particular of all objections to the abstract arising upon matter of fact (*Collett v. Thompson*, 3 Bos. & Pull. 246), but he will not be obliged to give a particular of all the objections in point of law arising upon the abstract: (*ib.*) And even if the particulars are not given, this will not prevent the plaintiff from proving any infraction or breach of the conditions of sale which may entitle him to annul the contract: (*Squire v. Tod*, 1 Camp. N. P. C. 292.)

No distinction recognised in an action at law between matters of title and matters of conveyance.—In an action for breach of contract for not making a good title, a court of law will not recognise a distinction between a matter of title and a matter of conveyance. If, therefore, a mortgage be not cleared off at the time at which a title in fee is agreed to be made, it will be treated as a breach of covenant to deduce a good title in fee on that day: (*Hanslip v. Padwick*, 16 L. T. Rep. 416.)

What persons must bring the action where purchaser dies after breach of contract.—In case of the purchaser's death after a cause of action has arisen on account of the breach of contract, his personal representatives, and not the heir, are the proper parties to maintain this action, for it arises on a personal contract, the breach of which causes a loss to the personal estate: (*Orme v. Broughton*, 10 Bing. 533; S. C., 4 Moore & Sc. 417.)

Damages.—In this form of action the plaintiff may recover against the vendor the expenses of investigating the title, including the charges for searches for judgments, and for comparing the abstract with the documents of title therein referred to (*Hanslip v. Padwick*, 16 L. T. Rep. 416), and also interest on his purchase money, if he can show it has been lying dead and unproductive. But in order to enable him to recover special damages for the costs of investigating the title, &c., he must lay them as such (*Richards v. Barton*, 1 Esp. N. P. C. 268); for it has been held that he cannot recover them under a count for money had and received (*Frühling v. Schroeder*, 2 Bing. 77); neither, it seems, can he recover them under a count for money paid to the defendant's use. Nor can a purchaser recover damages for any expenses incurred previously to entering into the contract; or for surveying an estate before he knows the

title; or the costs of a conveyance drawn by anticipation; nor the extra costs of a suit for a specific performance brought by the vendor.) Nor unless under special circumstances, will he be allowed to recover any loss he may have sustained by selling out of the funds (*Flureau v. Thornhill*, *supra*), or money laid out in repairs or improvements (*Worthington v. Warrington*, 18 L. J. (N. S.) 350, C. P.), or the difference between party and party, and his costs as between solicitor and client in an unsuccessful suit by a vendor for specific performance, or the costs in a suit by himself (the purchaser) for a specific performance when the bill is dismissed without costs on the Master reporting against the title: (*Malden v. Fyson*, 11 Q. B. 292.) Neither will he be entitled to recover any compensation for the fancied goodness of his bargain, where the vendor, without any fraud on his part, is unable to confer a good title to the property: (*Walker v. Moore*, 10 B. & C. 416.) But if there be actual *mala fides* on the part of the vendor, as if he sell the estate under the knowledge that he is not in a position to insure a title, it may be different; as, for example, where A., having a mere agreement for the purchase of an estate, sold it to B., who resold it to C., and then the whole matter went off through a want of title in the original vendor, it was held that B.'s claim was not to be restricted to nominal damages; still it does not appear upon what principle the damages were assessed: (see *Hopkins v. Grazebrook*, 6 B. & C. 31.)

Recovering deposit from auctioneer no bar to special action upon the contract.]—A purchaser, by recovering the deposit from the auctioneer, will not be precluded from proceeding in his special action against the vendor for the recovery of the interest on such deposit, as also the expenses incurred in the investigation of the title.

Money had and received.]—This form of action is usually adopted for the purpose of recovering back the deposit or any part of the purchase money that may have been paid into the vendor's hands, in case the latter should refuse or be incapable to fulfil the contract; hence, although the purchaser has paid the purchase money, yet, if he is evicted *before the conveyance is executed by all the necessary parties*, he may recover the purchase money in an action for money had and received, although the intended covenants do not extend to the title under which the estate was recovered, and he may be in possession of the estate: (*Cripps v. Reade*, 6 T. R. 606; *Johnson v. Johnson*, 3 Bos. & Pull. 162.) But

if the conveyance has been executed by *all* the necessary parties, and the purchaser is afterwards evicted by a title to which the covenants do not extend, he can neither maintain this or any other action for the recovery of his purchase money (*Cripps v. Reade*, 6 T. R. 606; *Bree v. Holbeck*, Doug. 654), nor can he obtain any relief in equity: (*Serjeant Maynard's Case*, 2 Freem. 1; *Anon.*, *ib.* 301.)

Requisites to support the action.]—To maintain this action, it will be necessary to prove—1. The contract; 2. The payment of the money; and 3. The breach on the part of the defendant.

Plaintiff entitled to recover notwithstanding he fails to prove a written contract.]—In this form of action a plaintiff may recover, notwithstanding he should fail in proving a valid written agreement; for although a parol agreement is insufficient to pass the property, still, if a purchaser has paid his deposit money under such an agreement, he will be entitled to proceed in an action for money had and received to recover it back again where a vendor fails or refuses to perform the contract: (*Walker v. Constable*, 3 Bos. & Pul. 306.)

Against whom an action to recover deposit should be brought.]—The action to recover back the deposit should be brought against the auctioneer and not the vendor; for it has been recently held that the purchaser at a sale, which proves to be abortive by reason of the vendor's inability to make a good title, cannot recover the deposit from the vendor as money had and received, but must bring his action against the auctioneer, he being the agent for both parties, and therefore the plaintiff's agent, and it is money in his hands for the plaintiff's use, and he it is from whom it is recoverable: (*Johnson v. Roberts*, 24 L. T. Rep. 250.)

No tender of conveyance necessary where vendor is unable to complete contract.]—Where the vendor is unable to make a good title, or is incapacitated from completing the contract, on account of his having resold the property, the purchaser may maintain his action for the deposit without preparing a conveyance: (*Seward v. Willock*, 5 East, 198.)

Proceedings under the Common Law Procedure Act.]—The purchaser has an equal right with a vendor to proceed under

the Common Law Procedure Act for a mandamus to enforce a specific performance of the contract, and in like manner he will be entitled to obtain an injunction to restrain the plaintiff from doing any waste or injury to the property. As to which see *ante*, p. 293 *et seq.*)

IV. REMEDIES IN EQUITY.

1. Of the various remedies to be obtained in equity.
2. Proceedings by bill.
3. Proceedings by claim under the new orders.
4. Special case.

1. *Of the various Remedies to be obtained in Equity.*

Common Law Procedure Act does not deprive courts of equity of their concurrent jurisdiction.]—Notwithstanding, as we have just before noticed, the Common Law Procedure Act (17 & 18 Vict. c. 125), entitles either the vendor or purchaser to obtain a writ of mandamus to enforce the specific performance of a contract, it does not in any way deprive courts of equity of their concurrent jurisdiction in this respect; and there are still some advantages in proceeding in the latter courts, which will in all probability, as far as sales of real property are concerned, cause them still to be resorted to in preference to courts of law, particularly in cases where questions are likely to arise respecting the validity of the title, which can be more easily determined in a court of equity, where, if the title is the only question in dispute, the cause need not be brought to a hearing, but the court, on motion, will direct an inquiry thereon, even before the defendant has filed his answer (*Ballmanno v. Lumley*, 1 Ves. & Bea. 224), and if any objection be raised, it is matter for a hearing of the cause: (*Gordon v. Bell*, 1 Sim. & Stu. 178.) Still a mere frivolous objection will not be attended to, and the court will look into the answer to see whether it be really a question between the parties; or, in other words, whether the question raised by the objection is concluded by authority, or is still open to argument; and therefore in a case in which, time not being originally the essence of the contract, the parties, after the day fixed by the contract for its completion, had gone on disputing about the title, till the purchaser on a day named, and without previous notice applicable to that

day, had declared the contract at an end, by bringing an action for the deposit, the court directed a reference: (*Wood v. Machee*, 5 Hare, 158.) But as a reference before a decree is only justified on the ground of saving time, the court refused to order the reference in a case in which a plaintiff had allowed a whole year to elapse before making the motion: (*Dorin v. Harvey*, 15 Sim. 49.) The parties may also by consent, instead of filing a bill for a specific performance, state a special case for the opinion of the court, and thus obtain a decision as to the title or evidence of title, or any other matter relating to the contract within the jurisdiction of the court. And where the exigencies of the case require it, the court will grant an injunction to restrain the commission of waste or any other act of destruction or injury to the property.

How suit for specific performance may be commenced.—A suit for a specific performance may now be commenced by bill, or by claim under the order of 22nd April, 1850. But the latter course of proceeding, from the many advantages it possesses, will in all probability supersede the old course of proceeding by bill; still, as proceedings under the before-mentioned orders are not by any means compulsory, either mode may be adopted; and in cases involving complicated and disputed matters of fact, the old course of proceeding may sometimes prove the best.

2. Proceedings by Bill.

Course of proceeding for a specific performance by the vendor.—When a vendor proceeds by bill for a specific performance against a purchaser, the bill should state how the vendor is seised of the property, whether as owner, trustee, &c. It should then set forth the agreement to purchase (which, if alleged to be in writing, as also that the instrument is properly stamped, the signatures will be presumed until the contrary be shown (*Kist v. Hobson*, 1 Sim. & Stu. 543);) the performance of all conditions precedent on the part of the vendor, as the delivery of the abstract of title, his willingness to perform his part of the contract, and the refusal on the part of the purchaser, with the pretences set up by the latter, and praying for a specific performance, and payment of the purchase money with interest.

Injunction sometimes applied for in a bill for specific performance.—Sometimes, in addition to the prayer for a

specific performance, the vendor also applies for an injunction to restrain the defendant from exercising any acts which may prove prejudicial to the property; as where a purchaser has been let into possession, and there is any reason to apprehend he may cut down timber, or commit any other act of waste or spoliation. So, pending a suit by a purchaser for specific performance of an agreement to sell a presentation to a living, the seller may be restrained by injunction from presenting, or the bishop from instituting, or, in case of a lapse, from collating to the living, any clerk not named by the purchaser (*Nicholson v. Knapp*, 6 Sim. 326.) But before granting an injunction of this kind, the court will generally put the vendor upon proper terms, and in most instances order him to pay the deposit into court. Still, he will not, it seems, be compelled to do this where he on his part is both able and willing to make a good title a conveyance to the purchaser, which the latter improperly refuses to accept: (*Wynne v. Griffith*, 1 Sim. & Stu. 147.)

Where the suit is by the purchaser.—Where the suit for a specific performance is by the purchaser, after setting out the terms of the contract, the bill proceeds to set out the payment of the deposit, if any such payment has been made, the request to the defendant to convey, and his refusal and pretences for not completing the contract, concluding with the usual interrogatories, and prayer for specific performance.

Requisites to support a bill for a specific performance.—In order to support a bill for a specific performance, the agreement should be a valid written instrument, certain, just, and fair in all its parts, and capable of being completely performed, as the court never decrees an agreement to be specifically performed unless it can execute the whole of it: (Ayck. 194, 5th edit.)

Agreement not restricted to one form only.—But although the agreement must be a valid one, the instrument is not arbitrarily restricted to one form only; hence, where a contract appears only upon the condition of a bond, the court will act upon it as an agreement, and not suffer the obligor, by paying the penalty, to escape from a specific performance of his contract: (*Logan v. Wrenholt*, 7 Bligh, 1.) And notwithstanding a court of equity will not generally enforce the performance of an unwritten contract, still there are circumstances, as we have noticed in a preceding part of

the present work, in which the court has departed from the strictness of this rule: as, in the instances above-mentioned, of a sale under a decree (*ante*, p. 94); or where the agreement has been confessed (*ante*, p. 95); or where there has been a part performance of it: (*ib.*)

Must be fair and just in all its parts.—A specific performance will never be decreed in cases of fraud, mistake, or of hard and unconscionable bargains; hence, equity will allow a defendant to show that under the circumstances the plaintiff is not equitably entitled to the prayer of his bill: (Stor. Eq. 70.) As, for example, that by fraud, accident, or even by mistake, the contract sought to be enforced is different from what was really intended between the parties: (*Malins v. Freeman*, 2 Kee. 25, 34); or that some material terms have been omitted in the agreement (*Jaynes v. Statham*, 3 Atk. 288); or that it is unconscientious (*Vaughan v. Thomas*, 1 Bro. C. C. 556), or unreasonable (see 1 Mad. Pract. 405, 2nd edit. and the cases there referred to), or fraud or surprise (*Clowes v. Higginson*, 1 Ves. & Bea. 256), or that there has been some concealment (*Shirley v. Stratton*, 1 Bro. C. C. 440; misdescription, or misrepresentation of the property, as well unintentional as wilful, and whether latent or patent (*Cadman v. Horner*, 18 Ves. 11; *Wall v. Stubbs*, 1 Mad. 81), or any unfairness attending the transaction; as where a party has been drawn into the contract whilst in a state of intoxication: (*Cragg v. Holme*, mentioned in a note to *Cook v. Clayworth*, 18 Ves. 14.)

Agreement must be capable of being performed.—If the vendor is unable to perform the contract, it will be a sufficient defence to a bill for the specific performance of it; consequently, if he is unable to make a good and marketable title to the property (*Marlow v. Smith*, 2 P. Wms. 298), or if it is burdened with incumbrances he is unable to discharge, the defendant will be entitled to rescind the contract.

Reference of title.—When the only question in dispute is the title, it was not, as we have just before remarked, the usual practice to bring the case at once to a hearing, but to direct an inquiry whether or not a good title can be made.

Modern course of proceeding on reference of title.—The modern course of proceeding, where an inquiry into the title is to be made, is to procure an order for the purpose, which may be obtained on motion, a notice of which must be served

on the opposite party, and the order is drawn up, passed, and entered in the usual way: (see the form of notice, 2 Ayck. Pract.) A copy of the order, and the abstract of title, together with written objections to the title, are carried into the judge's chambers, and the inquiry proceeded on in the usual way: (1 Ayck. Pract. 212, 213, 5th edit.)

If vendor can make a good title before report, sufficient.—It is not essential, in order to enforce a specific performance, that the vendor should be able to confer a good title at the time the contract was entered into; it is enough if he make out a good title at any time before the report; and therefore the terms are not whether the vendor was able to make a good title at the time of the contract, but whether he can make a good title at the time of the inquiry: (*Mortlock v. Buller*, 10 Ves. 292.) And if he can satisfy the court that he is able to make a good title by clearing up the objections reported, the court will make a decree in his favour: (*Paton v. Rogers*, M. & G. 256.) Still, as the vendor will have to pay the costs previously to the time to which his title is reported to be complete, it has become the usual practice for the court, at the same time that it directs an inquiry as to title, to direct that, in case a good title can be made, an inquiry as to when it was first shown that it could be made: (*Anon.* 3 Mad. 495; Ayck. 213.) But the rule that a vendor is only to be entitled to his costs from the time he can make a good title is not so inflexible as to admit of no exception: for it has been held, that where a vendor succeeds in a suit for a specific performance he is entitled to costs, notwithstanding the title was first shown in the Master's office, where the suit was occasioned solely by the conduct of the defendant: (*Peers v. Sneyd*, 17 Beav. 151.)

Course of proceeding when the bill is dismissed.—When the bill is dismissed on account of the vendor's being unable to confer a good title, it will generally be without prejudice to any legal remedy the purchaser may have upon the contract: (*Bennett College v. Cary*, 3 Bro. C. C. 390.) Still there are cases in which equity, on dismissing the bill, will restrain him from bringing an action at law, as, for instance, where he has evidently no title to the property he professes to sell: (*Macnamara v. Arthur*, 2 B. & B. 294.)

Costs.—Costs in equity are always discretionary with the court, although, generally speaking, they will fall upon the

losing party, unless where there are any equitable circumstances arising out of the case which may induce the court to determine otherwise. Either party filing a bill for a specific performance contrary to the terms of the contract will have to pay the costs: (*Williams v. Edwards*, 2 Sim. 78.)

Vendor bringing a bill for specific performance which is dismissed generally liable to costs.]—As a general rule, where a vendor brings a bill for a specific performance, which is dismissed for defects in his title, he will be decreed to pay the costs (*Walters v. Pyman*, 19 Ves. 351), and this even where the defect has arisen from an accident that has taken place after the contract has been entered into; as where the title deeds were, subsequently to the contract, destroyed by fire: (*Bryant v. Busk*, 4 Russ. 1.) But if a purchaser has set up any special matter of defence to a specific performance, as fraud, or misrepresentation on the part of the vendor, and such facts are disproved, the purchaser will have to pay the costs of the defence, notwithstanding the bill is eventually dismissed on account of the vendor's inability to make a good title: (*Wright v. Howard*, 1 Sim. & Stu. 190.) Still a purchaser will not render himself liable to costs by taking a fair and reasonable objection, although such objections may be overruled, unless the objections have been decided in a former cause, and the purchaser had notice of it, for then it seems he would be decreed to pay the costs: (*Biscoe v. Wilks*, 3 Mer. 456), but if a purchaser resists a specific performance on a ground which the court thinks untenable, he will not be relieved from costs because he acted under the opinion of counsel: (*Maling v. Hill*, 1 Cox, 186.)

Vendor obtaining a decree, when disallowed costs.]—But a vendor has been refused costs where the purchaser's objection to the title, although overruled, has been considered to have been fairly taken (*Aislabee v. Rice*, 3 Mad. 261; *Thorpe v. Freer*, 4 ib. 466), or where the title was not clear on the abstract before the time the bill was filed (*Wilson v. Clapham*, 1 Jac. & Walk. 36), or the objection was caused by the vendor or his solicitor (*Dakin v. Cope*, 2 Russ. 175), or the vendor has refused to supply the requisite evidence in support of his title, and this notwithstanding the purchaser's requisitions called for unnecessary evidence (*Newall v. Smith*, 1 Jac. & Walk. 263), or where a vendor has unsuccessfully contended that the purchaser had waived his right to investigate the title: (*Sidebottom v. Barington*, 5 Beav. 261.)

When bill is filed by purchaser.—If a purchaser file a bill for a specific performance, which is dismissed because the vendor cannot make a good title, the general rule is to dismiss the bill without costs (*Malden v. Fyson*, 9 Beav. 347); but if a purchaser files a bill with full knowledge of the objections, and the report is against the title, if he waives the objections he must pay the costs of investigating the title, but the other costs must be borne by the vendor: (*Bennett v. Fowler*, 2 Beav. 302.) A purchaser will also be refused his costs where a specific performance is enforced at a great undervalue: (*Burrowes v. Lock*, 10 Ves. 470.) And if a purchaser elects to have his bill dismissed upon its appearing that the vendor is unable to confer a good title, the usual practice is to dismiss the bill without costs (*Malden v. Fyson*, *supra*), unless the purchaser, in his bill, should insist that the vendor is unable to make a title, in which case it seems the purchaser must pay the costs whether he accepts or refuses the title: (*Nicholson v. Wordsworth*, 2 Swanst. 395.)

Either party acting wrongly in the proceedings must pay costs proportionably.—But if, as not unfrequently occurs, the party who eventually obtains the decree has been clearly wrong during some part, or the whole course of the proceedings, he will be compelled to pay a proportionate share of the costs of the suit: (*Farrow v. Rees*, 4 Beav. 25.) And when a defendant sets up a defence which prevents the plaintiff from obtaining the usual reference for title on motion, and fails to establish it, he may be at once directed to pay costs up to and inclusive of the hearing, without any regard to the result of the reference: (*Hyde v. Dalla way*, 4 Beav. 606.)

Course to be pursued where costs are the only matter in dispute.—If the costs are the only matter in dispute, the proper way will be to apply to the court by petition: still, this course cannot be pursued without the defendant's consent before answer: (*Langham v. Great Northern Railway Company*, 1 De Gex & S. 505.)

When costs are refused lest they should injure the title.—On bills for specific performance the court has in some instances deemed it imprudent to give the defendant costs, notwithstanding there may have been reasonable and weighty objections to the title; because to give costs is to injure the title he is compelled to take, and in such case the court has decreed a specific performance without costs: (*M^r Queen v.*

Farquhar, 11 Ves. 482; and see 2 Mad. Pract. 560, 2nd edit.)

Costs of action at law.]—Either party resorting to a court of law where equity is against him, will be fixed with the costs of the action (*Staines v. Morris*, 1 Ves. & Bea. 16); still, such right may be lost by neglecting to resort to equity so soon as the action is commenced at law: (*Grover v. Hugell*, 3 Russ. 433.)

3. *Proceedings by Claim under the new Orders.*

Powers conferred by new orders.]—The new Orders (22nd April, 1850) empower any person seeking and entitled to a specific performance of a contract for the purchase of any property, instead of filing a bill for specific performance, and without any special leave of the court, to file a claim in the Record and Writ Clerk's office. The form of claim is provided by the Orders for making such claim (see the form No. 8, schedule A.), and the filing of such claim is to have the same force and effect as the filing of a bill (see Orders 1 and 2); and in any case in which the form is not applicable, the court may, upon the *ex parte* application of the person seeking the relief, give leave to file the claim proposed to be filed (see Orders 5 and 6); and if such leave be given, an indorsement thereon by the registrar upon the proposed claim shall be a sufficient authority for the Record and Writ Clerk to receive and file such claim: (6th Order.)

Proceedings on claim.]—For the procedure on a claim the reader is referred to Mr. Drewry's *Practice in Equity*, published in this series.

Evidence.]—In proceedings under a claim, the same defences are allowed, and the same evidence is received, both in support and answer to the claim, as is admissible in suits by bill. The affidavit of a defendant to a claim will be treated in all respects as if it were his answer to a bill: (*Cockburn v. Green*, 20 L. J. 216.) As a general rule, evidence by affidavit alone is sufficient (*Smith v. Constant*, 10 L. J. 126); but where a contract is disputed, it must be produced in the usual way: (*Marshall v. Davies*, 14 Jur. 997.)

Witnesses may be compelled to attend and give evidence.]—Formerly the only evidence that could be given in a suit by claim was by affidavit, there being no means of compelling

the attendance of adverse witnesses to give evidence; but now, by the statute 15 & 16 Vict. c. 86, it is enacted that any party in any cause may, by a writ of *subpœna ad testificandum*, or *duces tecum*, require the attendance of any witness before an examiner of the court, or an examiner specially appointed for the purpose, and examine such witnesses orally, for the purpose of using such evidence upon any claim, in like manner as such witness would be bound to attend and be examined with a view to the hearing of a cause; and any party having made an affidavit to be used, or which shall be used, on any claim, shall be bound, on being served with such a writ, to attend before an examiner for the purpose of being cross-examined: provided, that the court shall always have a discretionary power of acting upon such evidence as may be before it at the time, and of making such interim orders, or otherwise, as may appear necessary to meet the justice of the case: (sect. 40.)

Notice to be given to the opposite party when witnesses are to appear before examiner.—When the attendance of witnesses is required before the examiner, for the purpose of being either examined or cross examined, the party requiring such attendance must give at least forty eight hours' notice to the opposite party of his intention to examine such witness, as also of the time and place of such examination, unless the court shall in any case think fit to dispense with such notice: (36th Order, 7th August, 1852.) And a like forty-eight hours' notice must in like manner, and to the same effect, be given where it is desired to cross-examine any party, whether a party to the cause or not, who has made any affidavit to be used or which shall be used on any claim: (34, 37, *ib.*; Ayck. 460.)

4. *Special Case.*

Proceeding by special case under statute 13 & 14 Vict.—The statute 13 & 14 Vict. c. 35, after reciting that proceedings in the Court of Chancery are attended with great delay and expense, which it is expedient to diminish, enacts that it shall be lawful for persons interested or claiming to be interested in any question cognizable in the said court, as to the construction of any act of Parliament, will, deed, or other instrument in writing, or any article, clause, matter or thing therein contained, or as to the title or evidence of title to any real or personal estate contracted to be sold, or otherwise dealt with, or as to the parties to, or the form of

any deed or instrument for carrying such contract into effect, or as to any other matter falling within the original jurisdiction of the said court as a court of equity, or made subject to the jurisdiction or authority of the said court, by statute, not being one of the statutes relating to bankrupts and including among such persons all lunatics, married women, and infants, in the manner and under the restrictions hereinafter contained, to concur in stating such question in the form of a special case for the opinion of the said court, and it shall also be lawful for all executors, administrators, and trustees to concur in such case: (sect. 1.)

*Contracting parties may by consent state a special case.]—*Under this enactment, the contracting parties may by consent state a special case for the opinion of the court, and thus obtain a decision as to the title, or evidence of title, or as to the parties to, or the form of any deed or instrument for carrying the contract into effect. The court may also take the opinion of a court of law, and the declaration will be binding as a decree, and may be heard, or reviewed: (13 & 14 Vict. c. 89, ss. 4, 11, 27.)

*How prepared.]—*Every special case shall be entitled as a cause between some one of the parties interested, or claiming to be interested, as plaintiffs or plaintiff, and the others or other of them, as defendants or defendant: (sect. 7.) It shall also state concisely such facts and documents as may be necessary to enable the court to decide the question raised thereby: (sect. 8.)

*Special case always prepared by counsel.]—*It is the invariable practice to have the special case prepared by counsel, and the signature of counsel to the case is expressly directed: (sect. 10.) Still, the same counsel may sign for all parties, as well for defendants as plaintiffs: (*Ex parte Praig*, 20 L. J. 136.)

*Copy of case to be forwarded to defendant's solicitor.]—*When the case is prepared, a fair copy is made and forwarded to the defendant's solicitor for approval, and must be signed by counsel on their behalf: (Ayck. 473, 5th edit.)

*Filing of special case.]—*When prepared, approved, and signed by the counsel for all parties, the special case is marked with the title of the judge to whose court it is

attached, and indorsed with the name of the plaintiff's solicitor, it may then be filed (sect. 10), with the Clerk of Records and Writs, the fee for which is 1*l.*, payable by means of a stamp: (6th Order, 25th October, 1852; Ayck. 473, 5th edit.), and at the same time an office copy is bespoken. Notice of filing is then usually given by a note in writing to the defendant's solicitor: (*id. ib.*)

Appearance.—The defendants in a special case may appear thereto in the same manner as defendant appears to bills, and no defendant shall be required to take an office copy of a special case, but an office copy thereof shall be taken by the plaintiff: (13 & 14 Vict. c. 35, s. 10.) The appearance is entered with the Clerk of Records and Writs, in like manner as in a suit by bill, and the like fee is paid, after which notice should be served on the plaintiff's solicitor or agent: (Ayck. 473, 5th edit.)

Effect of filing case and appearance thereto.—After filing special case and entry of appearance by the defendants, all the parties to the case are subject to the jurisdiction of the court in precisely the same manner as if the proceedings had been by bill: (sect. 11.) And such filing of the special case, and entering appearances thereto, shall be taken to be a *lis pendens*, and may be registered under the provisions of the act (2 Vict. c. 11), in the manner as any other *lis pendens* in a court of equity may be so registered, and unless and until so registered, shall not bind a purchaser or mortgagee without express notice thereof: (sect. 17.)

Setting down the case.—As soon as all the defendants shall have appeared to the special case, the same may, subject to the provisions thereafter contained, be set down for hearing, and subpoenas to hear judgment issued and served according to the practice of the court: (13 & 14 Vict. c. 35, s. 12.) In order to get the cases set down, a certificate must be first obtained from the Clerk of Records and Writs, that the case is in a fit state to be set down. Having obtained this, which must be on a 4*s.* stamp, it must be endorsed with the date, and also the name of the solicitor. It should then be taken to the registrar's clerk, who will then set the case down for hearing: (Ayck. 475, 5th edit.)

Subpœna to hear judgment.—Upon the special case being set down for hearing, subpoenas to hear judgment may be

issued, and served according to the practice of the court (13 & 14 Vict. c. 35, s. 12); but as special cases are usually of an amicable nature, it is the more general practice to dispense with the subpoena, and merely to give notice to the defendant's solicitor that the case is set down for hearing: (Ayck. 476, 5th edit.)

The hearing.—Upon the hearing, the case is argued in the same manner by the counsel employed by the parties, as upon the hearing of a cause, and upon the hearing of any such special case, it shall be lawful for the court to determine the questions raised thereon or any of them, and by decree to declare its opinion thereon, and, so far as the case shall admit of the same, upon the right involved therein, without proceeding to administer any relief consequent upon such declaration; and every such declaration of the court contained in any such decree shall have the same force and effect as such declaration would have had, and shall be binding to the same extent as such declaration would have been if contained in a decree made in a suit between the same parties instituted by bill; provided that it shall be lawful for the court, if it shall see fit so to do, before proceeding to make such decree as aforesaid, to send any case or cases for the opinion of Her Majesty's Courts of Common Law, reserving the consideration of all further directions and the costs, and to make such decree as aforesaid upon further directions; provided also, that if upon the hearing of such special case as aforesaid, the court shall be of opinion that the questions raised thereby or any of them cannot properly be decided upon such case, the court may refuse to decide the same: (13 & 14 Vict. c. 35, s. 14.)

Court cannot decree a specific performance upon a special case.—The court has no jurisdiction upon a special case to make a decree for a specific performance (*Evans v. Evans*, 22 L. T. Rep. 43), nor to make binding declarations of future rights: (*Garlick v. Lawson*, 10 Hare, App. 14; *Greenwood v. Sutherland*, *ib.* 12.)

Proceeding after decree pronounced.—Upon the decree being pronounced, the minutes are prepared and settled, and the decree passed and entered in the usual way, as upon the hearing of a cause: (Ayck. 478, 5th edit.)

Fees.—The fees for every decree on the hearing of a special case, including the court fee and the charge for

entry is 4*l.*, payable by means of a stamp : (6th Order, 25th October, 1852.)

Costs.]—The costs of all proceedings under this act are in the discretion of the court, which, under the 32nd section of the above-mentioned act (13 & 14 Vict. c. 35), has the power to direct the costs to be paid out of the estate : (*Evans v. Evans*, 22 L. T. Rep. 43 ; Ayck. 480, 5th edit.)

BOOK THE SECOND.

SECURITIES.



CHAPTER I.

MORTGAGES.

I. INTRODUCTORY OBSERVATIONS.

II. OF MORTGAGES IN GENERAL.

1. Advantages of a mortgage as a security.
2. Of the several kinds of property which may form the subject-matter of a mortgage.
3. Interests incapable of being mortgaged.
4. Qualifications of a mortgagor to execute a mortgage.

III. EQUITABLE MORTGAGE SECURITIES.

1. Mortgage agreements.
2. Equitable mortgages by deposit of title deeds.

IV. MORTGAGE BONDS AND WARRANTS OF ATTORNEY.

I. INTRODUCTORY OBSERVATIONS.

Various kinds of instruments employed as securities for money.—Those written instruments which come within the province of the conveyancer under the denomination of securities for money, are mortgages, bills of sale, bonds, warrants of attorney, and redeemable annuities. Bills of exchange and promissory notes are certainly written instruments for

securing the payment of money, but they are instruments which, from their peculiar nature and character, have always formed part of the common law business of an attorney's office, and therefore it would be out of place to treat upon such securities in a work which relates solely to the practice of conveyancing. Our consideration, therefore, will be confined to those securities only which we have above pointed out as belonging to the conveyancing department, which we purpose treating upon in the order in which they are there respectively enumerated.

II. OF MORTGAGES IN GENERAL.

1. Advantages of a mortgage as a security.
2. Of the several kinds of property which may form the subject-matter of a mortgage.
3. Interests incapable of being mortgaged.
4. Qualifications of a mortgagor to execute a mortgage.

1. *Advantages of a Mortgage as a Security.*

Remedies afforded to lender by a mortgage security.—Of all the securities enumerated in the preceding section, a mortgage is generally ranked as the most safe and eligible, from the ample remedies it affords for the protection of the lender, who may not only obtain the actual possession of the property itself, but may bring his action on the covenant for payment of principal and interest, or foreclose the equity of redemption; and in the mode in which most modern mortgages are now penned, he may also sell under the powers of sale contained in his mortgage deed, and pay himself his principal, interest, and costs out of the purchase moneys. Added to all which remedies, a mortgagee may at any time transfer his mortgage security to a third party, and this as well without the mortgagor's concurrence as with it.

Importance of ascertaining that the title is a marketable one.—But great as are the advantages which a mortgage security affords, it by no means dispenses with the necessity of the mortgagee's solicitor using his utmost vigilance in the conduct of the transaction; for he must not only see that the property is of adequate value to realize the principal and interest, and to cover all expenses that may be incurred in the business, but he must also ascertain that the title to the mortgaged premises is altogether unimpeachable. In fact, a better title is often required in the case of a mortgage

than is actually essential in an actual purchase ; because, in the latter case, the purchaser's real object is the possession and peaceable enjoyment of the purchased premises, and where he has no present intention of selling them again, or any occasion to raise money upon their security, he may be satisfied to accept a safe holding title ; but it is otherwise in the case of a mortgage where the land is conveyed only in the nature of a pledge for the repayment of the money advanced upon its security, and as a means of assuring its repayment whenever the lender may require it, so that unless the title is a marketable one, a mortgagee, although perfectly safe from eviction, or from any other adverse claims which may be made upon the mortgaged property, may nevertheless be prevented from realizing his principal and interest by exercising any powers of sale reserved to him over the premises, or by transferring the mortgage, from inability to show such a title as not only contains all the above-mentioned qualifications, but also such a title as a purchaser could be compelled, or as a transferee of the mortgage would be willing to accept.

Duties of mortgagor's solicitor in the conduct of a mortgage transaction.—The duties of a solicitor, when employed on behalf of a mortgagor, are very similar to those which devolve upon him when retained in behalf of a vendor ; that is to say, he must ascertain the amount of advance required, and also what property his client has to offer by way of security, as also its nature, quality, extent, and value, so as to enable him to form an accurate judgment as to whether or not it is likely to afford an adequate security ; and if more than adequate, whether it would be advisable to mortgage the whole of the property. He must also take especial care to let no carelessness or delay on his part retard the progress of the transaction, or afford a pretext for a similar line of conduct by the solicitor for the other party, always bearing in mind that in a mortgage it is often of such importance that the business should be completed so that the mortgagor may be certain to receive the money he requires at some fixed specified time ; for being but one day, or possibly even one hour, too late, may totally mar the sole object for which the mortgage was entered into.

Where the property is of a mixed kind.—If the property consists of lands held under different tenures ; as freehold, leasehold, or copyhold ; or of various kinds and descriptions ; as dwelling-houses, or farms, or buildings employed for the

purposes of trade, &c., and the whole of these will not be required to make up sufficient value for the proposed security, it becomes important to ascertain what particular portions it will be most eligible to select; and where the amount required is large in proportion to the actual value of the property, it may often be advisable to consider whether other kinds of property, which, although not commonly made the subject-matter of a mortgage, may not be rendered available for that purpose; as also whether securities otherwise inadequate may not be rendered safe by some collateral acts, as by effecting assurances upon lives, the concurrence of sureties, or the giving of cognovits, warrants of attorney, or the like.

2. *Of the several kinds of Property which may form the Subject-matter of a Mortgage.*

What kind of property is considered to form the most eligible mortgage security.—The most eligible mortgage security is an estate in fee simple in freehold property, although lands of copyhold or customary tenure, or even leasehold estates, when the latter are held for a long term, and unfettered by heavy rents or burdensome covenants, often afford an unobjectionable security.

Other kinds of property adapted for mortgage securities.—But property of almost every kind and description, whether real or personal, moveable or immoveable, may form the subject-matter of a mortgage. Hence, in addition to freehold, copyhold, or leasehold property, rents, tithes, advowsons, franchises, turnpike and market tolls, railway, bridge, and navigation shares, may all be rendered available as a mortgage security, and this whether the mortgagor hold the property in possession, or in remainder or reversion. In like manner, also, chattels personal of nearly every nature and quality, such as stock in the funds, bills of exchange and promissory notes, debts, legacies, government annuities, title deeds, bills of lading, ships' freighting, articles of merchandise, and even possibilities, may all be mortgaged to any one who will be satisfied to make advances upon such securities.

A mortgage may itself be mortgaged.—A mortgage may itself form the subject-matter of a security of a like nature. This is sometimes resorted to in cases where a mortgagee is precluded from calling in his mortgage until some certain fixed period, or it is adopted in those instances where the mortgage security is an eligible one to the mortgagee, who

only requires a small advance to meet some present emergency, which he would rather do by mortgaging his security than by calling in his mortgage; whilst, in other cases, a mortgagee is occasionally induced to enter into a mortgage of this kind as the best means he possesses of raising money upon his security, being unable to obtain a transfer of it, in consequence of its being mortgaged up to or beyond its actual value, and he is in immediate want of his money, the amount of which he is unable to obtain by an immediate sale or foreclosure of the mortgaged premises: (see the form of a mortgage of the above description, 2 Con. Prec., Part V., Section II., No. XVIII, p. 128, 2nd edit.)

Advantages and disadvantages of a mortgage of a mortgage.]—Securities of the above kind have an advantage over a mortgage of an equity of redemption, because the mortgagee in the former case has the title deeds delivered over to him, which a second mortgagee has no right to, or even to compel the prior mortgagee to produce. The disadvantages are, that the mortgagee takes subject to such equity of redemption as is subsisting upon the original mortgage, and to all the stipulations in favour of the original mortgagor as are thereby conferred upon him. In addition to this, the mortgagee of a mortgage is liable to account to his immediate mortgagor for any act of negligence on his part in availing himself of any of the remedies to recover the mortgage debt; but he may always protect himself against the latter liability by inserting a clause of indemnity to that effect in the mortgage deed: (see the form 2 Con. Prec., Part V., Section II., No. XVIII., clause 14, p. 133.)

3. *Interests incapable of being Mortgaged.*

Salaries appertaining to certain offices.]—There are, however, some interests which are incapable of being mortgaged. Amongst these it may be mentioned that the salaries of most of the offices under the government, or relating to the public service, are incapable of being assigned, and cannot therefore be made the subject-matter of a mortgage; as, for example, the pay of an officer either in the army or navy (*Collier v. Falton*, 1 Turn. & Russ. 425), the salaries of the judges (1 Swanst. 74), or the profits of a clerk of the peace: (*Palmer v. Bate*, 6 Moore, 38, n.)

Exceptions to the rule that salaries to public officers are not assignable.]—Still the above-mentioned rule admits of many

exceptions, the profits of some public offices being assignable, and where this occurs, they may be converted into mortgage securities. Thus it has been decided that the registrar of the Court of Chancery (*Drummond v. Duke of St. Albans*, 5 Ves. 438), as also the clerk of the deputy registrar of the Prerogative Court (*Clarke v. Richards*, 1 You. & Coll. 351), may assign the profits of their respective offices; and notwithstanding, as we have just before remarked, an officer either in the army or navy is incapacitated from assigning either his full or half pay, this restriction does not extend to a pension given for past services: (*McCarthy v. Goold*, 1 Ball & B. 389.) But a pension granted by act of Parliament for the more honourable support of the dignities of the peerage, such as the pension granted to the Duke of Marlborough to support the dignity of him and his posterity (*Davis v. Duke of Marlborough*, 1 Swanst. 74), is incapable of being either assigned or charged.

Reversionary interests of married women.—Another species of interest which is incapable of being charged as a mortgage security is the future interest which a married woman takes in chattels personal, which cannot be assigned so as to be binding on her husband in case he should happen to survive her (*Greedy v. Lavender*, 16 L. T. Rep. 195), although the law is otherwise with respect to her chattels real, an assignment of which by the husband would be binding both upon the wife and her representatives: (*Donne v. Hart*, 2 Russ. & Myl. 260.)

Profits of a living.—The tithes or other emoluments arising from a benefice in the hands of the incumbent are also incapable of being mortgaged, clergymen having been disabled by statutory enactments from alienating their tithes or other property which they hold in their ecclesiastical capacity (13 Eliz. c. 20; 3 Car. 1, c. 4; 43 Geo. 3, c. 84; 57 Geo. 3, c. 99); so that previously to the act of 1 & 2 Vict. c. 110, for registering judgments, it was admitted that no device or contrivance which legal ingenuity could suggest was capable of rendering property of this kind in the hands of a clergyman available as a mortgage security, he being, by virtue of the above-mentioned enactments, totally disabled from charging his benefice. But as the 13th section of the act 1 & 2 Vict. c. 110, enacts that “a judgment entered up shall operate as a charge upon all lands, tenements, *rectories*, *advowsons*, *tithes*, rents, and hereditaments, &c., of or to which such person, &c., be seised, possessed of, or entitled

to, for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall at the time of entering up such judgment, or at any time afterwards have any disposing power which he might, without the assent of any other person exercise for his benefit," it was generally considered amongst the profession, that a judgment entered up would be a charge upon a benefice, and both Lord Cranworth and Kindersley, V. C., adopted this view of the statute; the consequence of which was, that a practice sprung up of effecting mortgages upon property of this description by giving a warrant of attorney as an accompanying security upon which a mortgagee, upon entering up judgment, might at once have proceeded to sequester the living, and thus, by a kind of side wind, render a living in the hands of an incumbent available as a mortgage security; but the Court of Appeal have, in a recent case (*Hawkins v. Gathercole*, 24 L. T. Rep. 281), decided that the Act of Victoria (1 & 2 Vict. c. 110) has not altered the pre-existing law, which disabled a beneficed clergyman from charging his living, and that it does not render a judgment entered up under its provisions a charge upon property of this nature; for that it was not the design of that statute to change the law as to what property might or might not be incumbered, but only to make a judgment a charge in the nature of a mortgage upon property that has been charged by the owners.

Mortgage by incumbent authorized in certain cases.]—But notwithstanding an incumbent is disabled from charging his living with an ordinary mortgage, he is nevertheless authorized by the statute 17 Geo. 3, c. 52, to borrow money for the purpose of building or repairing the parsonage house, by a deed contained in the schedule annexed to the said act: (see the form 2 Con. Prec., Part V., Section II., No. IX., p. 86, 2nd edit.)

3. *Qualifications of Mortgagor to execute a Mortgage.*

All persons not labouring under disabilities may generally mortgage their interests.]—It may be laid down as a general rule, that all persons not labouring under legal disabilities, such as infancy, lunacy, coverture, or the like, may execute a mortgage commensurate with the estates and interests they take in the property, and even a married woman, except as to a reversionary interest in chattels personal (as to which see *ante*, p. 118), or which she is expressly restricted

from disposing of by way of anticipation, may, with her husband's concurrence, effect a mortgage to the extent of the interest she takes in the mortgaged premises.

Not always essential that mortgagor should have an estate commensurate with the interest he conveys.]—It is not necessary that in every instance a mortgagor should have an estate or interest of the same extent as the interest he conveys as a mortgage security; as, for example, where a mortgage in fee is made by a tenant for life in exercise of a power; nor, in some cases, is it requisite that he should take any estate or interest whatever in the property; as where trustees, or executors, who take no interest in the lands, are authorized to mortgage them for the purpose of raising money to satisfy the trusts, or purposes for any settlement or will; as also, under certain circumstances, guardians, trustees, or the committees of lunatics, &c.

As to persons taking limited interests in the mortgaged premises.]—With respect to mortgages effected by persons who take only limited interests, or in right of other parties; as tenants for life, guardians, trustees, committees of lunatics, &c., all these persons, under the provisions of certain acts of Parliament, viz., the Inclosure Acts (41 Geo. 3, c. 109, s. 30), and the act for the Redemption of the Land Tax (42 Geo. 3, c. 116), are empowered to create mortgages that will be binding on the actual owners of the property; and tenants for life, or other limited interests, may have powers of mortgaging conferred upon them, which may embrace the whole fee, or other absolute interest in the lands or other property, whatever it may be.

As to powers of mortgaging in trustees and executors.]—As a general rule, whenever trustees or executors have an *unlimited* (as distinguished from a restricted) power to charge an estate for any specified purpose, it will give them an absolute power of disposition over the whole property, which they may exercise either by sale or by mortgage; and it has been recently determined that executors or administrators may insert a power of sale in a mortgage of the personal estate of the testator or intestate for the purpose of administering his assets: (*Russell v. Plaice*, 22 L. T. Rep. 324; *Long v. Long*, 5 Ves. 443.) A power to sell implies also a power to mortgage: (*Mills v. Banks*, 3 P. Wms. 9; *Ball v. Harris*, 8 Sim. 485.) And an implied charge of debts

would authorize a mortgage or sale for the purpose of raising a fund to discharge them: (*Dalton v. Hewin*, 6 Mad. 91.) So, where trustees under a will are directed to raise a gross sum of money for any particular purpose out of the rents and profits, this will empower them either to mortgage or sell the estate for that purpose: (*Allan v. Backhouse*, 2 Ves. & Bea. 65.) But the extensive operation of this power will be restricted where the terms of it are inconsistent, or are not co-extensive with the whole property; as, for example, where the charge is directed to be raised out of the rents and profits, or *by sale of part of the lands*, or by leasing the lands for three lives or twenty-one years: (*Ivery v. Gilbert*, 2 P. Wms. 13.)

As to trusts and powers for raising portions.—With respect to trusts or powers for raising portions for children, a different rule prevails from that which is adopted in the case of ordinary charges upon real property. When portions are charged on the rents and profits, the latter must first of all be applied for that purpose; nor can the property itself be either sold or mortgaged, until the annual proceeds have proved inadequate to satisfy the charge. If, therefore, a certain time is fixed for payment, as, for example, to children on their attaining twenty-one, and they were of tender age at their father's death, a court of equity would not authorize a sale or mortgage for the purpose of raising those portions until the time of payment arrived, and the rents and profits are shown to be insufficient to meet them: (*Evelyn v. Evelyn*, 2 P. Wms. 659.) But if, at the same time, it is evident that the annual proceeds of the property cannot possibly be sufficient to produce the required sum at the appointed time, or even where no time at all is appointed, within a reasonable and convenient time the court has generally directed either a sale or mortgage for that purpose: (*Trafford v. Ashton*, 1 P. Wms. 416.)

Whether power to sell or mortgage authorizes a sale to pay off a mortgage made in pursuance of such powers.—It has long been a doubtful point whether, under a power to raise money by sale or mortgage, and a mortgage made in pursuance thereof, a sale could afterwards be made for the purpose of discharging it; but the prevailing opinion of the profession is against the validity of the sale, because as soon as the mortgage is made the power is exhausted: (*Palk v. Clinton*, 12 Ves. 48.)

III. EQUITABLE MORTGAGE SECURITIES.

1. Mortgage agreements.
2. Equitable mortgages by deposit of title deeds.

1. *Mortgage Agreements.*

Not usual practice in mortgages to enter into a previous written contract.—It is not the usual practice to enter into any written contract for a mortgage, which arises in some measure from the circumstance that the same *ad valorem* duties are chargeable upon a mere agreement for a mortgage as if an actual conveyance had been made of the mortgaged premises; and although a 1*l.* 15*s.* common deed stamp would have covered the actual mortgage made in pursuance of such agreement, still this, in mortgages of small amount, was quite enough to deter parties from incurring an expense they did not consider sufficiently counterbalanced by the advantages a previous contract would have afforded them; added to which, it has been urged that it would be of little advantage to a mortgagor upon whom these expenses would fall to be able to enforce a specific performance of an agreement which a mortgagee might render of little or no advantage by calling in his money or foreclosing the mortgage at the earliest possible opportunity, and thus put the mortgagor to nearly, if not quite, as heavy expenses as the most sordid usurer could have exacted from him for a similar accommodation upon mere personal security. The latter view of the matter is certainly correct where a mortgage is to be made upon the usual terms, and the proviso for redemption is to be restricted to six, or twelve months, after the execution of the mortgage deed. But in those cases where the mortgage is intended to be a permanent security for a certain number of years, and it is important, as it generally is, that the mortgagor should have the money advanced to him at some particular time, and he is certain he can confer an unimpeachable title, it will be well worth his while to incur the expense of a previous agreement in writing, and a small amount of additional stamp duty, so as to enable him to hold the mortgagee to his bargain: a precaution which would have saved many a man from the ruin he has incurred by being unable to meet engagements he had made upon the faith of having a parol agreement for a mortgage specifically performed at the appointed time, which the mortgagee, for some reason or other, has refused to carry out, and which the mortgagor, for want of a previous written contract, has no means of specifically enforcing.

How mortgage agreement should be penned.—A mortgage agreement, after giving the names and description of the parties, should state the agreement for the mortgage, setting out at the same time the amount to be advanced, the parcels, and the estate therein which is to be conveyed to the mortgagee; that the mortgagor will deliver an abstract and deduce a good title to the premises, and convey the same to the mortgagee on receipt of the mortgage money, which the mortgagee thereby agrees to advance. The terms upon which the mortgage is to be made should then be set out, in which it is usually stipulated that all costs incidental to the transaction shall be borne by the mortgagor (but this is superfluous, as, whether inserted or not, all these costs must be defrayed by him); that the mortgagor's solicitor shall prepare the abstract and get all outstanding legal estates, but that the mortgage deed should be prepared by the mortgagor's solicitor (which two latter stipulations are in fact only in accordance with the usual practice in such cases.) The terms on which the premises are to be redeemed, and the amount of interest reserved, ought to be next set forth; and if, as is usually intended, a power of sale is to be inserted, the terms with respect to previous notice should be mentioned; and at the same time it may be stipulated that the power of sale is not to deprive the mortgagee of his remedy by foreclosure, although the latter stipulation is unimportant, it being quite clear a power, as distinguished from a trust for sale, does not debar a mortgagee of his remedy by foreclosure. The agreement then concludes with stipulating that the mortgagor shall enter into the usual mortgage covenants, and that the mortgagee will covenant not to exercise the power of sale without giving the mortgagor due notice, and also that the mortgagor shall enjoy until default: (see the form 2 Con. Prec., Part V., Section 1., No. I., pp. 3, 12, 2nd edit.)

Propriety of having memorandum of terms upon which mortgage is to be made.—Under any circumstances, indeed, there ought to be some memorandum of the terms upon which the mortgage is to be made, instead of allowing any of these matters to rest simply upon a verbal understanding, which, when the business comes to be finally settled, may be either disputed, misunderstood, or forgotten. This, indeed, should never be omitted where the deed is intended to contain anything beyond what is incidental to the interests which the mortgagor and mortgagee take in the property in their respective characters. Even if the mortgage is to contain a power of sale, a previous stipulation to that effect

ought to be made; and where the deed is to contain any special provisions; as that the mortgage is not to be paid off for a certain time, or by instalments; or it is to be provided that the mortgagee will accept a reduced rate of interest on punctual payment; or that the mortgagor may redeem in parcels, &c.; or where any special powers are to be reserved to the mortgagor, or conferred upon the mortgagee, as powers of leasing, or the like, the terms of all these powers should be reduced into writing, with the concurrence of both parties, so that neither of them may afterwards avail himself of the pretext that he never assented to any such stipulations, or that they are different from what he intended to enter into: (see forms adapted to this purpose, 2 Con. Prec., Part V., Section I., No. I., pp. 3 to 12, inclusive, 2nd edit.)

Liquidated damages.—A clause may be added to a mortgage agreement, by which the parties bind themselves in a certain sum, by way of liquidated damages, for a due performance of their contract; still this clause, although common in the case of absolute sales, is not often adopted in mortgage transactions: (see the form 2 Con. Prec., Part V., Section I., clause G., p. 10, 2nd edit.)

Mortgage agreement, if under seal, will operate as a covenant.—Whenever a mortgage agreement is entered into upon a stamped instrument, it will be advisable to have it under seal also, and it should contain a covenant that the mortgagor will pay the principal and interest. By this means the instrument will acquire the operation of a deed of covenant, and thus enable a mortgagee to maintain an action at law for the recovery of his mortgage debt and interest, in the same manner as if a regular conveyance by way of mortgage had been actually made to him.

2. *Equitable Mortgages by deposit of Title Deeds.*

Utility of equitable mortgages by deposit of title deeds.—The mortgage agreements which occur most frequently in practice are equitable mortgages effected by the deposit of title deeds, which is sometimes found extremely useful when the money is wanted for a short period only, and the borrower has adequate means of paying off the charge.

Writing not absolutely necessary to constitute an equitable mortgage.—It is not absolutely necessary that a writing or other memorandum should be made to give validity to a

deposit of this kind; for an equitable mortgage may be effected by mere word of mouth only; still, a written agreement has a decided advantage, not only as affording a more satisfactory proof of the transaction, but also from entitling the depositary to his costs out of the depositor's estate, in case the latter should happen to become bankrupt, which the former would not be entitled to where the agreement was by parol only, and therefore becomes rather an important matter where the borrower is a person amenable to the bankrupt laws: (*Ex parte Brightwell*, 1 Swanst. 3; *Ex parte Thorp*, 1 Mont. & Ayr. 441.)

Objections taken to written mortgage agreements.]—The objection to a written agreement in transactions of this nature is the liability to the stamp duty, which if it attaches will, as we have just before remarked, be of precisely the same amount as upon actual mortgage of the property, the expense of which borrowers are of course anxious to avoid. This may be effectually done by merely altering the form of the writing from a formal agreement to a mere acknowledgment in writing, which, if properly penned, will require no *ad valorem*, or any other stamp duties whatever: (*Pyle v. Partridge*, 15 Mees. & Wels. 20; *Fancourt v. Thorpe*, 15 L. J. (N. S.), 344, Q. B.; *Tilsley on Stamp Acts*, 476, 492.) Still, this precaution has been so little attended to, that it is the daily practice of bankers and mercantile men to make advances upon a large amount on unstamped memorandums, stating the deposit as that day made, and containing an agreement in express terms from the depositor to execute a valid mortgage at some future time, or whenever called upon; the consequence of this is that the instrument becomes chargeable with the full amount of *ad valorem* duties upon a mortgage, which might have been avoided altogether by adopting a different course of proceeding to accomplish precisely the same object.

How stamp duties may be avoided upon a written memorandum, on a deposit of the title deeds.]—To do this, the depositor, at the time he deposits the deeds, should, in the presence of a witness, verbally acknowledge that such deeds are deposited as a security for the money advanced, and that the depositor will execute a valid mortgage of the property when thereunto requested by the depositary. The witness should make a written memorandum of this at the time, and then read it over and explain the terms of it to the depo-

sitor, and this memorandum (see the form 2 Con. Prec., Part V., Section I., No. IV., p. 22, 2nd edit.), the witness will be authorized to refer to for the purpose of refreshing his memory in case he should at any future time be called upon to give evidence of the nature of the transaction. After this is done, a memorandum may at any time afterwards be drawn up, stating the previous deposit and its object, with an undertaking on the part of the depositor to execute a valid mortgage to the depositary, or such person as he shall direct: (see the form 2 Con. Prec., Part V., Sect. I., No. I., p. 25, 2nd edit.) Such a writing is admissible in evidence, although unstamped, and the depositary would consequently become entitled to his costs in case of the depositary's bankruptcy; for so far from a formal stamped instrument being necessary to afford this protection, it has even been held that a letter acknowledging the object of the deposit, and written some months afterwards, was sufficient for this purpose: (*Ex parte Reynolds*, 2 Mont. & Ayr. 104; S. C., 4 Dea. & Ch. 278.)

Distinction between an equitable mortgage by deposit of title deeds, and a deposit of share certificates.—There is a material distinction between an equitable mortgage created by the deposit of title deeds relating to real estates, and a deposit of share certificates, such as those relating to railway shares, or the like. In the former case, as a general rule, actual delivery is necessary, yet when so delivered, the transaction is complete; whereas, in the latter case, actual delivery is not essential, if the proper notice be given to the secretary of the company, but unless such notice be given, the lien will not be consummated: (*Goming v. Prescott*, 2 You. & Coll. 488.) Wherever, therefore, an equitable mortgage is to be effected by a deposit of share certificates, or of documents of a like nature, no time should be lost in giving notice to the secretary, or other officer of the company who is authorized to receive notices of this nature: (see the forms of memorandum of deposit, and of notice, 2 Con. Prec., Part V., Section I., Nos. VI. and VII., pp. 26 to 28, 2nd edit.)

Exceptions to the general rule requiring an actual deposit of the deeds.—The general rule that an actual delivery of the title deeds is essential to create an equitable mortgage of the property to which they relate is not so inflexible as to admit of no exceptions; for where a party has only a partial interest in such property, so that it is not in his power to

make an actual deposit of the title deeds themselves, a memorandum, showing his intention to make the lien, will in such case suffice: (*Ex parte Furley*, 1 Mont. D. & D. 683.) Still, it seems doubtful whether a court of equity would give effect to a security of this kind, where it would tend to the prejudice of other parties interested in the property; as, for example, where the depositor is only interested in the land as one of several partners, and the property comprised in such deeds belongs to the partnership firm: (*Ex parte Broadbent*, 4 Dea. & Ch. 3.)

Depositor may create an equitable mortgage commensurate with his interest in the property.—But in every other instance, it seems, a party may, by a deposit of the deeds, create an equitable mortgage commensurate with the duration of his estate and interest in the lands; hence, a copyholder may effect an equitable mortgage by a deposit of his copies of court roll (*Whitbread v. Jordan*, 1 You. & Coll. 325), as may also a lessee, by depositing his lease (*Doe d. Pitt v. Hogg*, 4 Dow. & Ry. 226), and this, notwithstanding it contains a covenant not to assign without licence.

No depositor can create a lien beyond his estate in the property.—But no depositor can create a lien beyond the estate that he himself takes in the property to which the documents relate; consequently, if the depositor be only tenant for life, his life estate only will be charged: (*Bates v. Danby*, 2 Atk. 207.) And where a person takes no estate or interest in the property, he can create no lien whatever, and the rightful owner will be entitled to recover his documents from the depositary in whose hands the former may have placed them, without paying any portion of the debt for which they were deposited: (*Bell v. Taylor*, 8 Sim. 216.)

Depositary may create a lien to the same extent that he himself has upon the property.—But this rule does not extend to deposits of the deeds made by a depositary, who has had such documents delivered to him by the rightful owner of the property to which they relate, for his equitable mortgage will so far confer an interest in the lands upon him, as to authorize him to create a lien upon them to the extent of his own mortgage debt, by delivering over such documents as a security to a third party: (*Ex parte Smith*, 2 Dea. & Ch. 271.) Still, such lien will be only binding on the original depositor to the amount of the sum for which he originally deposited them; consequently, a subsequent depositary would

be bound to deliver up the documents, upon receiving payment of that sum, without any regard to the amount of money which he himself may have advanced upon their security: (*Hobson v. Melland*, 2 Moo. & Rob. 342.)

Lien may extend to future as well as present advances.—An equitable mortgage by deposit of deeds may be made to relate to future as well as past or present advances: (*Ex parte Nettleship*, 2 Mont. D. & D. 124.)

How memorandum should be penned when it is intended that the lien should extend to new partners of a firm.—In cases of deposits of title deeds with bankers, merchants, or any partnership firm, by way of equitable mortgage, if, as is almost universally the case, it is intended that any new partners admitted to the partnerships are to have the benefit of the security, the intent should always be inserted in the memorandum which accompanies the deposit (see the form 2 Con. Prec., Part V., Sect. I., No. IV., p. 22, 2nd edit.); for although such an arrangement is capable of being proved by parol evidence, such proof must always be attended with expense and inconvenience, may be sometimes difficult of proof, and perhaps fail of proof altogether, from inability to produce sufficient evidence of the facts: (*Ex parte Oakes re Waters*, 2 M. D. & D. 236.)

Title not often investigated in mere equitable mortgages.—In equitable mortgages, it is not usual to put a mortgagor to the expense of the investigation of the title; still, no solicitor ought to advise a client to advance money upon a security of this kind, unless he has good reason to believe the title to be a safe one, and that the borrower is the lawful owner of the property.

Depositary's solicitor should see that all the proper documents are deposited.—The depositary's solicitor should see that the whole of the documents are deposited, otherwise the depositary, by retaining some, and depositing them with a third party, might cause other claims to be set up, when questions must inevitably arise as to which party is to be entitled to a preference; or possibly a court of equity might, as sometimes has happened, refuse to enforce the claim of either: (*Ex parte Pearse*, 1 Buck. 525.)

Purpose for which deposit is made should be stated.—The purpose for which such deposit is made should also be

stated at the time, for it seems that the mere fact of depositing deeds, even with a banker to whom the depository may be indebted, does not of itself necessarily imply that such deposit is made as a security for the repayment, for they may be placed there for safe custody only: (*Mouniford v. Scott*, 3 Mad. 34.) But a deposit of title deeds for the purpose of preparing a legal mortgage will create an equitable mortgage for the interim. The point, indeed, was at one time doubtful (*Morris v. Wilkinson*, 12 Ves. 192), but the validity of such an assurance is now clearly established: (*Keys v. Williams*, 3 You. & Coll. 62.)

IV. MORTGAGE BONDS AND WARRANTS OF ATTORNEY.

Bonds formerly required by way of collateral security.—It was formerly the practice to require a bond by way of collateral security, to enforce the payment of a mortgage debt; but, as it is now established that debt will lie upon the covenants contained in the mortgage deed, which being under seal creates a debt by specialty, ranking equally with a bond debt, and equally binding on the devisees of the covenantor, the usual practice now is, except in some particular instances we shall hereafter notice, to dispense with the bond altogether, which only entails an unnecessary expense upon a mortgagor, without conferring any proportionate advantage to a mortgagee.

Warrant of attorney sometimes given as collateral security.—But where the security is not very ample, a warrant of attorney is sometimes given to enter up judgment on the debt, as it also is to confess judgment in ejectment, where the mortgagor himself is in the possession of the mortgaged premises, in order to enable the mortgagee the more speedily to obtain the legal possession in case he should be desirous of doing so.

CHAPTER II.

MORTGAGES OF FREEHOLD ESTATES.

- I. GENERAL OUTLINE OF PRACTICE.
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 - III. PRACTICAL DIRECTIONS FOR PREPARING A MORTGAGE DEED OF A FEE SIMPLE ESTATE.
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 - IV. MORTGAGES BY DEMISE.
 - V. MORTGAGES OF ENTAILED PROPERTY.
 - VI. MORTGAGE OF AN EQUITY OF REDEMPTION.
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I. GENERAL OUTLINE OF PRACTICE.

Mortgages of freehold estates, how conducted.—In mortgages of freehold estates, and in fact of every kind and description of real property, the mortgagor's solicitor, at his client's expense, furnishes and delivers an abstract of the title to the solicitor of the mortgagee, the latter of whom investigates the title precisely in the same way as upon a purchase; makes his objections and requisitions in like manner; and if these are satisfactorily answered and complied with, he institutes the necessary search and inquiry for incumbrances, and when every doubt and difficulty is cleared

up, he prepares the mortgage deed. This is always done by the mortgagee's solicitor at the costs of the mortgagor, upon whom it devolves to pay all the costs incurred throughout the whole course of the transaction.

Assurances for perfecting title prepared by mortgagor's solicitor.—If any previous assurances are necessary for the purpose of enabling the mortgagor to confer a good title, such as the getting in of outstanding legal estates, or the execution of any statute deeds in order to bar entails, the release of any charges or incumbrances on the lands, or any other acts or matters connected with the title, the mortgagor must of course defray the costs of all these assurances; still, as these are matters of title, which it is the mortgagor's business to supply and perfect, his solicitor, and not the solicitor of the mortgagee, is the proper person to prepare them.

Course to be pursued by mortgagor's solicitor in preparing assurances to perfect title.—For the same reasons, the mortgagor's solicitor, who prepares these assurances, is in nowise bound to forward the drafts of them to the mortgagee's solicitor for approval previously to their engrossment. The mortgagor's solicitor's duty is to see that such assurances effect their designed object; and when this has been done, and such assurances are completed, they become part of the mortgagor's title, an abstract of which should be prepared by his solicitor, and transmitted to the solicitor of the mortgagee; the latter of whom should then act in the same manner respecting them as if they had formed part of the original abstract of title to the premises.

Mortgagee's solicitor must prepare and forward draft of mortgage deed.—The draft of the mortgage must be prepared and forwarded by the mortgagee's solicitor to the solicitor of the mortgagor, in precisely the same way as the draft of a deed of conveyance from vendor to purchaser, and in like manner no alteration, however slight and trivial, should be made by either party after approval, without acquainting the other of the circumstance, and nature of the alteration, previously to the engrossment of the deed.

II. MORTGAGE DEEDS.

Instruments used as mortgage assurances.—The same kind of instruments have been used in mortgages as in absolute

conveyances of property. Hence, when a feoffment with livery of seisin was the ordinary mode of conveyance from a vendor to a purchaser, the same mode of assurance was adopted in mortgages when the fee simple in the lands was intended to pass and become vested in the mortgagee, or any other person in his behalf; and when feoffments gave way to conveyances by way of lease and release, the latter kind of assurances were in like manner adopted as mortgage securities. In small mortgage transactions, appointments in pursuance of powers, where the mortgagor had such a power vested in him, were often resorted to in order to save the expense of a lease for a year. But now the lease for a year (4 & 5 Vict. c. 21), and the stamp duties respecting it being dispensed with (8 & 9 Vict. c. 106), a conveyance by way of grant and release is now become the general mode of assurance in mortgages of fee simple estates.

Mortgages in fee more common now than in ancient times.]
—Mortgages in fee simple are more common in the present than they were in ancient times, when a preference was generally given to creating those assurances by limiting a long term of years, which was granted to the mortgagee himself, or some other person in trust for him. The reason for adopting this preference arose in great measure from the old doctrine that the estate being absolute at law, became liable to the dower of the mortgagee's wife, and also to his other real charges and incumbrances; but courts of equity have long since broken through these strict rules of law, treating the mortgage as it really is, a pledge in the nature of a security for the payment of money, but conferring rights upon the mortgagee perfectly distinct from what he would acquire as an ordinary purchaser of the absolute interest in the property; for although the legal estate will descend upon his heir-at-law, the latter will only hold for the benefit of the personal representatives, all the beneficial interest being, in equity, considered as personal estate: (*Ellis v. Grave*, 2 Cha. Cas. 50; *Canning v. Hicks*, *ib.* 187; *Tavor v. Grover*, 2 Vern. 367.) Upon an estate of this kind no right of dower could possibly attach, and therefore that difficulty was long since removed, as also those difficulties arising from the doctrine that the mortgaged premises would become subject to the other real charges and incumbrances of the mortgagee, but which it has long since been determined they are not liable to.

Arguments urged in favour of a long term of years as a

mortgage security.—One strong argument in favour of a long term of years as a mortgage security is, that in case of the mortgagee's death both the term itself and the mortgage debt become vested in the same person; whereas, in the case of a mortgage in fee, as we have just before remarked, the estate of the mortgagee goes to the heir, and the mortgage debt to his personal representatives, thus producing a separation of rights attended with some degree of inconvenience both to mortgagor and mortgagee, but which was in great measure counterbalanced in favour of the latter, by enabling him, in case of foreclosure, to acquire the whole fee; whereas, in case the mortgage had been only for a term, he would only have been entitled to acquire the term. To get over the latter inconvenience, a practice sprung up of making the mortgagor covenant that, upon nonpayment of the money, he would not only confirm the term, but also convey the freehold and inheritance to the mortgagee, discharged of all equity of redemption: (2 Fonbl. Eq. 256; and see Butler's note to Co. Litt. 206.)

Trusts and powers of sale in mortgage assurances.—The process of foreclosure, which in former times was not only a most tedious, but also costly mode of proceeding, led to the introduction of trusts and powers of sale in mortgage deeds, which at length became so general as nearly, if not entirely, to supersede the foreclosure process altogether. Great improvements have, however, been latterly made in proceedings by foreclosure, as well in saving time as in expense, but this is a subject we shall enter into more fully hereafter.

Mortgage in fee, and for a term, to the same mortgagee, sometimes comprised in the same instrument.—In certain cases both a fee and a term of years are limited to the same mortgagee. This plan has been resorted to where two mortgagees advance money at the same time upon the same estate, and each of them is desirous of having a lien upon the whole property, and yet of avoiding the interposition of a mutual trustee for that purpose. To accomplish this object, one moiety of the estate is limited to one mortgagee for a long term of years, with remainder to the other mortgagee in fee, and so *vice versâ*, so that each mortgagee is first mortgagee for a term and second mortgagee in fee of one moiety, and second mortgagee of a term and first mortgagee in fee of the other moiety: (see the form of a mortgage of this kind, 2 Con. Prec., Part V., Section II., No. XIV., p. 107, 2nd edit.)

Mortgage deeds should be made by indenture.—Mortgage deeds have almost invariably been made by indenture, for a deed poll being of one part, and binding only the maker, is ill adapted to assurances of this kind, which ought to be binding and conclusive on all the parties.

III. PRACTICAL DIRECTIONS FOR PREPARING A MORTGAGE DEED OF A FEE SIMPLE ESTATE.

1. As to the date and parties.
2. Recitals.
3. Of the testatum or granting clause.
4. Habendum.
5. Proviso for redemption.
6. Powers and trusts for sale.
7. Covenants.
8. Special powers.

1. *As to the Date and Parties.*

The title and date of the instrument, and description of the parties, is precisely the same as in a purchase deed, a subject that has been sufficiently treated upon in the foregoing part of this work to render comment here superfluous.

2. *Recitals.*

It is inexpedient to load the mortgage deed with unnecessary recitals. If, therefore, the mortgagor has the title deeds, which it is the practice always to deliver over to the mortgagee, it will be superfluous to set out recitals of them in the mortgage deed, beyond showing how, and in what manner, the mortgagor became possessed of, and is entitled to dispose of, the mortgaged premises.

How limitations to dower uses should be recited.—If the property was conveyed to the mortgagor to uses to bar dower, then such conveyance should be recited (see the form 2 Con. Prec., Part V., Section II., No. I., clause 2, p. 32, 2nd edit.), and the mode in which the uses are limited should be set out, but this, if necessary, may be done very briefly: (see the form 2 Con. Prec., Part V., Section II., No. II., clause 2, p. 44, 2nd edit.) And where the conveyance is simply in fee, the recital may generally be very concise: (see the form 2 Con. Prec., Part V., Section II., No. V., clause 2, p. 60, 2nd edit.) In the latter case, or indeed, in most cases where the mortgagor is seised simply in fee, and brevity is

desirable, it will be sufficient merely to state that fact, or the recital may be omitted altogether, and the testatum be made to follow immediately after the names and description of the parties: (see the form 2 Con. Prec., Part V., Section II., No. III., clause 2, p. 51, 2nd edit.; *id. ib.* No. IV., clause 2, p. 54.)

Recitals, when essential to show the relationship which exists between the parties to the conveyance.—But when the concurrence of several parties is necessary to pass the estate in the lands, or to relieve them from incumbrances, it becomes essential to show by the recitals the relationship that exists between these parties and the property which is to be made the subject-matter of conveyance.

Recitals should generally be carried further back on a second than upon an original mortgage.—In the instance of a second mortgage, also, it will generally be advisable to carry the recitals further back than in the case of an original mortgage, or at any rate, sufficiently far to show that the mortgagor has a title to the equity of redemption; because the first mortgagee is entitled to the sole custody of the mortgage deeds, which the second mortgagee has no legal, or even equitable, right of access to in order to show his title, much less to call for their production in support of it.

As to recitals where parties convey in distinct rights.—And whenever two or more persons convey in distinct rights, as tenant for life and remainder-man, the instrument creating their respective estates and interests in the property should always be recited, so as to show clearly and distinctly the extent and nature of their respective estates and interests: (see recitals of this kind 2 Con. Prec., Part V., Section II., No. XIII., clause 2, p. 103, 2nd edit.)

As to mortgages of reversionary or contingent estates.—In the case of mortgages of estates in reversion, or of contingent or executory interests, the instrument creating such estates or interests should be recited, and the nature and extent of such interests truly set forth: (see the form 2 Con. Prec., Part V., Section II., No. XIX., clause 2, p. 135, 2nd edit.)

Where the mortgage is in exercise of a trust or power.—Whenever a mortgage is made in exercise of any trust or power contained in a purchase deed, settlement, or will, those instruments must be recited in the mortgage deed, and

the terms of the trust or power correctly set out (see the forms 2 Con. Prec., Part V., Section II., No. XIII., clause 2, p. 103, 2nd edit.; *id. ib.* No. XV., clause 2, p. 112), and the language of the deed itself must show that such terms have been duly complied with.

Where mortgage is made in exercise of powers conferred by act of Parliament.—If the mortgage is made in the exercise of any powers conferred by act of Parliament, such act must be recited, and it must also be shown by other recitals, or by the language of the mortgage deed, that all the terms prescribed by such act have been properly carried into effect: (see the form 2 Con. Prec., Part V., Section II., No. V., clause 3, p. 61, 2nd edit.; *id. ib.* No. VI., clauses 3 to 6 inclusive, pp. 70, 71; *id. ib.* No. IX., clause 2, p. 87, 2nd edit.)

Tithes.—Where the mortgage is of tithes, it is usual to show by the recitals a seisin in fee in the tithe owner, and the amount at which the tithes have been commuted under the Tithe Commutation Act; but all this may be done in very few words, and the whole facts may be stated in a single recital: (see the form 2 Con. Prec., Part V., Section II., No. VII., clause 2, p. 77, 2nd edit.)

When mortgage is to secure past, as well as present or future advances.—Where a mortgage is made to secure past, as well as present or future, advances, the deed should contain a recital of that arrangement, which should be so clearly expressed as to leave no doubt as to the terms of it: (see forms 2 Con. Prec., Part V., Section II., No. X., clause 2, p. 92, 2nd edit.; *id. ib.* No. XI., clause 2, p. 94; *id. ib.* No. XII., clause 2, p. 97, 2nd edit.)

As to mortgages by client to his attorney.—Greater care is necessary in penning recitals of this kind in mortgages from a client to his attorney than as between other parties. The reason of this is, that securities are often given to secure bills of costs, as well as moneys actually advanced by the attorney to his client for his own use, and the law, although it authorizes an attorney to take a mortgage from his client to secure costs already incurred (*Pitcher v. Rigby*, 9 Pri. 79; *Jones v. Tripp*, Jac. 322), will not allow such a mode of assurance to secure future costs. In a mortgage of this kind, therefore, the amount of costs already incurred should be recited, and if a further advance is also to be made, that

amount should be stated also, the amount of each being distinctly set out: (see the form 2 Con. Prec., Part V., Section II., No. X., clauses 2, 3, pp. 92, 93, 2nd edit.) It may be proper, however, to remark, that a security to secure costs already incurred will not be invalidated in consequence of the deed purporting to embrace future costs also; for the assurance will be good so far as the costs already incurred are concerned, although bad as to the costs to be incurred thereafter. And the restriction against future advances relates only to securities for costs, for an attorney may take a security from his client for future advances generally, as well as from any other person: (*Pitcher v. Rigby, supra.*)

As to mortgages of an equity of redemption.—Where the mortgage is of an equity of redemption, the instrument creating the first mortgage ought to be recited, as also the amount of principal moneys and interest due and owing upon such security, and the agreement for the present loan, subject to such pre-existing mortgage: (see the form 2 Con. Prec., Part V., Section II., No. XVII., clauses 2, 3, and 4, pp. 122, 123, 2nd edit.)

Matters of fact, how recited.—Matters of fact, such as births, marriages, deaths, failure of issue, probates of wills, grant of letters of administration, and so forth, must be recited according to the order in which those events severally occur: (see the form 2 Con. Prec., Part V., Section II., No. XV., clause 3, p. 113, 2nd edit.; *id. ib.* No. XIX., clause 3, p. 135.)

As to arrangement of the recitals.—Although, in mortgages, as in purchase deeds, the recitals are usually inserted immediately after the description of the parties, they are sometimes in both instances placed in other parts of the deed. Thus, where brevity is an object, the instrument creating the power is merely recited or referred to in the testatum clause: (see the form 1 Con. Prec., Part II., Section II., No. IV., clause 2, p. 57, 2nd edit.) Sometimes the recitals of the documents of title, and of facts relating to it, are placed after the descriptions of the parcels; at others, the recitals are inserted in that part of the instrument which is to operate upon the subject-matter to which such recitals relate; as, where a mortgage deed contains, as it occasionally does, a covenant from the mortgagee for the production of title deeds, in which case the recital relating to such production immediately precedes the covenant (see the form 1 Con.

Prec., Part I., Section II., No. XXXI., clause 6, p. 176, 2nd edit.), which is usually contained at the very end of the deed; as also occurs where trust moneys are advanced by two or more trustees, in which case it is proper to recite that circumstance at the end of the deed, and at the same time to declare that in the event of the death of either of them in the lifetime of the others, the right to the mortgage money shall survive to the latter, whose receipt shall be a sufficient discharge for the same, without the necessity of any concurrence of the personal representatives of the deceased trustee: (see the form 2 Con. Prec., Part V., Section II., No. XIII., clause 7, p. 106, 2nd edit.)

3. *Of the Testatum or Granting Clause.*

Testatum clause worded in the same terms in a mortgage as in a purchase deed.—The testatum or granting clause is worded in precisely the same way in a mortgage as in a purchase deed, except that sometimes in a mortgage assurance the consideration money is expressed to be "*lent, advanced, and paid,*" instead of simply "*paid,*" as in a purchase, for the purpose of showing that the money is advanced by way of loan, and not on account of an absolute sale; still this is sufficiently shown by the whole tenor of the instrument, and the word "*paid*" being the most apt and expressive term that can possibly be used, is usually the only one employed in modern mortgage assurances.

As to the general words.—The general words are also the same in a mortgage, as in a purchase deed; as are also the all-estate and all-deeds clauses; and as it has become a common practice to omit the reversion clause in assurances of the latter kind, that clause is in like manner left out in most modern mortgage assurances.

As to the all-deeds clause.—In mortgages in fee the all-deeds clause is rather a formal than an essential part of the instrument, as by a conveyance of the land, the deeds themselves will pass without express grant being made of them: (as to which, see *ante*, p. 221.)

4. *Habendum.*

Habendum clause framed in the same terms in a mortgage in fee, as in a purchase deed.—The habendum clause runs in the same form as in a purchase deed, where the lands

are simply limited in fee; but to the limitation of such estate it is generally superadded that it is limited subject to the proviso for redemption, and also to the trusts or powers of sale (if the deed is to contain any such) thereafter contained (see the form, 2 Con. Prec., Part V., Section II., No. I., p. 33, 2nd edit); but, where brevity is an object, the latter portion of the clause may be altogether left out; the limitation of the fee being immediately followed by the proviso for redemption itself, without any previous reference to it whatever: (see the form, 2 Con. Prec., Part V., Section II., No. V., clauses 6 and 7, pp. 63, 64, 2nd edit.)

Where a mortgage is of an equity of redemption.—If the mortgage is of an equity of redemption, the habendum to the mortgagee in fee must be subject to the previous mortgage, as well as subject to the proviso for redemption and powers of sale (if any) therein contained: (see the form 2 Con. Prec., Part V., Section II., No. XVII., clause 6, p. 123, 2nd edit.)

Where the mortgage is itself of a mortgage security.—And where the mortgage is made of a mortgage security, then the habendum clause by which the mortgaged premises are limited to the mortgagee, must be limited "subject to such equity of redemption, if any, as is subsisting in the premises under, or by virtue of the original mortgage security," as well as subject to the proviso for redemption contained in the present mortgage: (see the form 2 Con. Prec., Part V., Section II., No. XVIII., clause 9, p. 131, 2nd edit.) A power of attorney to sue for the mortgage debt should always be inserted in assurances of the latter description: (see *id. ib.* clause 7, p. 130.)

Where the fee is subject to a limitation over by way of executory devise.—It sometimes happens that a mortgagee may be induced to accept a title where the fee is subject to a limitation over, by way of executory devise; for although a defect of this kind is a fatal objection to a title, yet the contingency upon which it depends, although considered possible in the eye of the law, may nevertheless be impossible in fact; and thus a perfectly safe, though not strictly a marketable title, may be made to the property: (see observations upon this subject, *ante*, p. 73.) But in all mortgages of property so circumstanced, the limitation in the habendum should be qualified by expressing it to be,

"subject, nevertheless, and contingent as aforesaid:" (see the form 2 Con. Prec., Part V., Section II., No. XX., clause 6, p. 142, 2nd edit.)

Where the mortgage is of a rent-charge.—In a mortgage of a rent-charge, there is a slight variation in the language of the commencement of the habendum clause, which generally runs in the following terms "To HAVE, HOLD, RECEIVE, TAKE AND ENJOY," &c., followed by a short general description of the rent-charge, which is then limited to the mortgagee; his heirs and assigns, subject to the proviso for redemption, &c.: (see the form 2 Con. Prec., Part V., Section II., No. XXII., clause 6, p. 149, 2nd edit.)

5. *Proviso for Redemption.*

How proviso for fee should be penned.—In mortgages in fee the proviso for redemption generally stipulates that upon the mortgagor, his heirs or assigns, paying to the mortgagee, his executors, administrators or assigns, the principal moneys advanced upon the mortgage security, and interest therein specified, at some certain fixed period, usually six calendar months from the date of the mortgage deed, the mortgagee will reconvey the mortgaged premises to the mortgagor: (see the form 2 Con. Prec. Part V., Section II., No. I., clause 7, p. 33, 2nd edit.; *id. ib.* No. II., clause 2, p. 46.) Sometimes some particular place, as well as time, is appointed for the payment, as the Common Dining Hall of the Middle Temple, or of Lincoln's Inn.

Reasons for appointing place as well as time of payment.—The reason for appointing a place as well as time of payment is, that where no place is appointed, it is incumbent on the mortgagor to find out the mortgagee, and tender him the money at the appointed time; but where a place of payment is also appointed, then it will be sufficient if the mortgagor attend at such appointed place, and be then and there ready to make such tender, although the mortgagee should neglect to come to receive it.

As to cesser of estate upon payment of principal and interest at the appointed time.—Sometimes it is provided that upon payment of principal moneys and interest at the appointed time, the estate of the mortgagee shall cease; but this form is not generally so well adapted as the former one to mortgages in fee simple at the present day; particu-

larly where powers of sale, which now form a component part of nearly every mortgage security, are inserted in the deed; as it may possibly happen that the mortgagee's estate may actually have ceased under the proviso for determining it, before such powers were actually exercised; if not by actual payment, at least by tender and refusal, which in the eye of the law is equivalent to actual payment, and which is a danger it will always be prudent to guard against: (5 Jarm. Byth. edit. Sweet, 565, 566.)

When proviso for cesser of estate should be used in preference to proviso for reconveyance.—In certain cases, however, the proviso for reconveyance would be improper; as in the case of mortgages under the provisions of the act 17 Geo. 3, c. 52, for building and repairing parsonage houses (see the form 2 Con. Prec., Part V., No. IX., clause 7, p. 90, 2nd edit.), or in mortgages under Inclosure Acts.

As to mortgages under Inclosure Acts.—In mortgages under Inclosure Acts, it will be improper to appoint any fixed time for payment, and the proviso for redemption must be framed in general terms (see the form 2 Con. Prec., Part V., No. VI., clause 9, p. 72, 2nd edit.), for the general act (41 Geo. 3, c. 109) expressly directs that the mortgage deed shall contain a proviso for a cesser of term whenever the moneys thereby secured shall be satisfied; from whence a strong opinion is entertained among the profession, that a proviso for the cesser of the term upon some specified day, would not only be improper, but absolutely void.

Reservation of interest.—The amount of interest reserved should always be set out in the proviso for redemption, and this, until very recently, could not be allowed to exceed five per cent.; but the usury laws having been repealed by a recent statute (17 & 18 Vict. c. 90, s. 1), any amount of interest the parties may agree upon may now be reserved, without in any way endangering the security.

How clause should be penned where mortgage is not to be called in until some fixed period.—Where the mortgage is to remain for any fixed time; as seven years for instance; the proper course is to postpone the time of payment to such future period, and to declare in the meantime that the

interest shall be payable either yearly, half-yearly, or at some other stated time: (see the form 1 Hughes Pract. Mort., tit. Mortgages in Fee, No. XIII., clause 2, p. 137; 2 Con. Prec., Part V., Section II., No. I., clause A., p. 33, *in notis*, 2nd edit.; *ib.* No. XV., clause B. *in notis*, p. 114, 2nd edit.) Still, it is not always usual to allow the mortgagor to have the sole benefit of this arrangement; and in order that he may not by suddenly paying off the mortgage, take the mortgagee by surprise, and before he can have reasonable time to look out for another investment, it is also declared that the mortgagor will not tender the mortgage debt, or take any steps for the redemption of the premises until the expiration of the before-mentioned period: (see the form 2 Con. Prec., Part V., Section II., No. XV., clause A. *in notis*, pp. 114, 115, 2nd edit.)

Mortgage being allowed to remain for a fixed period sometimes made to depend upon punctual payment of the interest.]—Sometimes, when the mortgage is allowed to remain for a certain fixed period, this indulgence is made to depend upon punctual payment of the interest. In cases of this kind, the proviso for redemption is worded in the usual manner for the payment of the principal and interest at the six months' end, or some other stated period, after which a clause is inserted, usually at the end of the mortgage deed, stipulating that if the mortgagor shall pay the interest regularly at the times appointed for such payment, or within some reasonable time afterwards, the mortgagee will neither call in his money, or exercise the power of sale limited to him by the mortgage deed: (see the form 1 Hughes Pract. Mort., B. No. XIII., clause 3, p. 138.)

How clause should be penned for reducing rate of interest upon punctual payment.]—It is sometimes arranged that if the interest is paid regularly the mortgagee will receive it at a reduced rate; as, for example, four or four-and-a-half in lieu of five per cent., provided the interest be paid at the appointed times. To carry out this object, however, the higher rate of interest must be first reserved, and it may then be provided that it shall be reduced upon punctual payment (see the form 1 Hughes Pract. Mort., B. No. XIII., clauses 4 and 5), which, if paid accordingly, equity will compel the mortgagee to accept; but if not so paid, the higher rate of duty will then attach, which equity will refuse to relieve against: (*Stanhope v. Manners*, 2 Eden, 167.) But an agreement to pay an increased rate of interest in

default of punctual payment will be considered in the nature of a penalty, and this equity will always relieve against.

Single breach will not generally deprive mortgagor of benefit of future punctual payments.—Notwithstanding equity, as we have just before observed, will not relieve against a breach of the condition where a lesser rate of interest is agreed to be received in consideration of punctual payment, it seems that a single breach will not deprive a mortgagor from availing himself of future punctual payments (*Stanhope v. Manners*, 2 Eden, 197), unless the clause relating to it be so worded as to deprive him of that benefit: (see a form to the above effect, 1 Hughes Pract. Mort., B. No. XIII., clause 5, p. 139.)

How clause should be penned to deprive mortgagor of benefit of future punctual payments.—Some care and attention will be required in penning this clause. In *Stanhope v. Manners*, above referred to, the mortgage deed contained a proviso that as often as the interest should be paid half-yearly on the days appointed, or within three months next after each, so much should be deducted as would make the interest three-and-a-quarter per cent. The first half-year's interest not having been tendered until after the three months, but the second half-year's interest before, it was held that the mortgagee was only entitled to the higher rate of interest for the half-year that was tendered after the time. In this case, it must be borne in mind that the clause for reducing the interest expressly provided that as often as the interest should be paid half-yearly at the appointed time, the lower rate of interest only should be payable, which the court held expressed the intent that in every instance where three-and-a-quarter interest was tendered in time it should be accepted, and that words could not be stronger to express that intent. Still, this construction may be negated by expressions which clearly denote a contrary intention. Whenever, therefore, it is designed that a breach of any one of the payments is to deprive the mortgagor of all benefit of the reduced rate of interest, it should be provided that in case of default in payment at the appointed time, the mortgagee should not afterwards be obliged to accept less than the full amount of interest reserved, notwithstanding any subsequent payment or tender of any sums of money on account thereof within the appointed periods: (see the form 1 Hughes Pract. Mort., tit. Mortgages in Fee, No. XIII., clause 5, p. 139.)

Where the breach is not to deprive mortgagor of the benefit

of future punctual payments.]—But if, on the other hand, it is intended that the mortgagor shall only pay an increased rate of interest in respect of such payment as was not made at the appointed time, the clause should state that in consideration of such punctual payment the mortgagee will, as often as the same is so made, accept the reduced rate of interest in satisfaction of the larger amount of interest thereinbefore covenanted to be made: (see the form 1 Hughes Pract. Mort., tit. Mortgages in Fee, No. XIII., clause 4, p. 139; 2 Con. Prec., Part V., Section II., clause C., p. 49, *in notis*, 2nd edit.)

How provisos of the above kind should be inserted in mortgage deed.]—Provisoes like those we have just mentioned ought properly to be inserted in the mortgage deed itself, although this is not absolutely necessary, as they may be contained in a separate instrument; and it has even been held that a verbal agreement is sufficient for the purpose: (*Milton v. Edgeworth*, 5 Bro. Parl. Cas. edit. Fowl. 313.) These provisos should be preceded by a covenant to pay the interest half-yearly, or at some other stated period, distinct from the proviso for the payment of principal and interest.

Power of distress for arrears of interest.]—A power to distrain for the interest is often found useful where the mortgagor is himself the tenant, and it is intended that he shall remain in the occupation of the mortgaged premises; for by this means, the mortgagee is enabled to levy the amount of his interest without involving himself in any matters of account relative to the surplus rents. The best part of the instrument in which to insert this clause is either immediately after the proviso for redemption in which the amount of interest is reserved, or after the covenants for payment of principal and interest: (see the form 1 Con. Prec., Part V., Section II., No. XIX., clause 10, p. 138, 2nd edit.)

Interest cannot be made to carry interest.]—Notwithstanding the 17 & 18 Vict. c. 90, s. 1, by abolishing usury laws allows any rate of interest to be reserved, so that it need not now be restricted to five per cent., or to any other limited amount, still this will not allow interest upon a mortgage security to be made to carry interest by any terms or expressions that can be inserted in the instrument by which such security is created. But although this cannot be done by the mortgage deed itself, yet, when such arrears have

actually accrued and remain undischarged, a written assent by the mortgagor to pay interest on it will be binding upon him: (*Blackburn v. Warwick*, 2 You. & Coll. 92.) The best way of doing this is by a deed of further charge, which mode of security is now considerably facilitated by the low amount of stamp duties that are now chargeable upon small advances by way of mortgage.

How proviso for redemption clause should be penned where the mortgage is to be paid off by instalments.—Where the mortgage is to be paid off by instalments, the amount of such instalments, and the time and mode of payment, should be clearly stated, and also the amount of interest to become payable on account of the same: (see the form 2 Con. Prec., Part V., No. VII., clause 6, p. 80, 2nd edit.; *id. ib.* No. XIX., clause 9, p. 138, 2nd edit.)

Where the mortgagor is to be empowered to redeem in parcels.—If the mortgagor is to be empowered to redeem in parcels, it should be provided that upon payment of some specified portion of the mortgage money, he shall be entitled at any time, and as well after breach of the condition as before, until the foreclosure of the equity of redemption, upon giving some previous specified notice, usually six calendar months, to redeem some particular portion of the mortgaged premises at any time he may think proper; which premises should for this purpose be either distinguished by being set out in separate schedules, by numbers, or by some other description by which the property may be separately identified from the rest: (see the form 1 Hughes Pract. Mort., tit. Mortgages in Fee, No. XIII., clause 1; 2 Con. Prec., Part V., Section II., note B., p. 34, 2nd edit.)

How deed should be stamped where the mortgage is to secure future, as well as past or present advances.—Where the mortgage is to secure future, as well as past or present advances, it was formerly necessary to limit the ultimate sum to be secured to some certain specified sum, otherwise the security being for an uncertain amount, the highest rate of duty chargeable upon mortgage securities, viz., 25*l.*, would have attached upon it; but now, by the recent Stamp Act (13 & 14 Vict. c. 97), where the total amount of money secured, or to be ultimately recoverable thereupon, shall be uncertain and without limit, then the same shall be available for such an amount as the stamp duty impressed upon the deed will be sufficient to cover. In mortgages, therefore, to

secure future advances, although it is not necessary to restrict the limit of the amount to be secured, in order to prevent the higher rate of stamp duties from attaching, it is nevertheless essential to have the deed impressed with a stamp, denoting sufficient duties to cover, not only past and present advances, but also such future advances as are likely to be made by the mortgagee upon the premises.

As to mortgages to secure balances on a banking account.]—Where, as not unfrequently happens, a mortgage is made to bankers by a customer to secure the balance of a banking account, it is a common practice for the proviso for redemption to be preceded by a power of sale, the proviso for redemption being in the form of a covenant from the mortgagees to produce their banking account to the mortgagor upon request, and to reconvey to him on payment: (see the form 2 Con. Prec., Part V., Section II., No. XII., clause 6, p. 99, 2nd edit.)

Mortgages under the Benefit Building Societies Acts.]—In mortgages under the Benefit Building Societies Act, the proviso for redemption usually provides that upon payment by the mortgagor to the trustees of the society of the monthly sum in respect of the several shares he holds in the society, and the monthly sum as interest for the sum advanced, the trustees will indorse a receipt thereof upon the mortgage deed, whereby the mortgage will become vacated, and the mortgaged premises become vested in the mortgagor without any reconveyance whatever according to the provisions of the act 6 & 7 Will. 4, c. 3, s. 5: (see the form 2 Con. Prec., Part V., Section II., No. V., clause 7, p. 64, 2nd edit.)

As to the reconveyance of mortgaged premises.]—The proviso as to reconveyance ought regularly to be to the parties who otherwise would be entitled to the equity of redemption of the mortgaged premises. In mortgages in fee, therefore, the usual practice is to state that the mortgagee, at the request and cost of the mortgagor, his heirs and assigns, will reconvey the mortgaged premises to him or them, free from all incumbrances created thereon by the mortgagee, his heirs or assigns in the meantime. But when there are several parties, mortgagors taking distinct estates and interests, as tenants for life and remainder-men, or husband and wife seised in her right, tenants in common, co-partners, &c., then the safest way seems to be to stipulate

that the mortgagee will, at the request and cost of the persons for the time being entitled to the equity of redemption, reconvey the mortgaged premises to them accordingly: (see the form 2 Con. Prec., Part V., Section II., No. XIX., clause 9, p. 138, 2nd edit.)

6. *Powers and Trusts for Sale.*

Powers and trusts for sale usual in most modern mortgage deeds.]—Powers and trusts for sale are of rather modern introduction, although they now form one of the component parts of nearly every mortgage deed. These powers are usually inserted immediately after the proviso for redemption, and limited to arise in default of payment at the time therein specified.

Distinction between the operation of trusts and powers of sale.]—Trusts for sale seem to have been first adopted, but they have recently given way to powers of sale, which certainly possess greater advantages, as the latter may or may not be exercised, accordingly as the mortgagee thinks proper, so that, being optional, these powers do not debar him of his right of foreclosure; whereas trusts for sale being always imperative, it necessarily follows, that whenever the mortgaged lands are limited upon express trust to sell, the trustees must sell accordingly, and the mortgagor cannot resort to the remedy by foreclosure.

Where trusts for sale are more eligible than a power for that purpose.]—There is one particular instance, however, which sometimes happens in practice, where trusts for sale are better adapted to a mortgage security than a power for that purpose. This occurs where a person has contracted to sell an estate, and circumstances have arisen to prevent the completion of the purchase, which may not be finally settled until some distant period, and in the interim the vendor wishes to raise money upon the property. Now it would be inconsistent with the situation he stands in, for a vendor, during a pending contract with a purchaser to mortgage directly to a third party, subject to the usual proviso for redemption and powers of sale; but there would be no inconsistency in conveying the premises to his mortgagee, upon trust to carry out the contract by conveying the property to the intended purchaser, and after discharging the expenses of the sale to retain the principal moneys due

to him upon his mortgage security, and to pay over the surplus to the mortgagor or his representatives.

How power of sale should be penned.—Various forms of powers of sale have been adopted by the profession, but the best plan of all appears to be to empower the mortgagor, at any time after default in payment, and either with or without the mortgagee's concurrence, to sell the mortgaged premises, by public auction or private contract, with power to buy in and resell, authorizing him also to give receipts which shall be a sufficient indemnity to purchasers, and to do all necessary acts for perfecting the sale, and to stand possessed of the purchase moneys, and thereout to defray the expenses of the sale, to retain all principal moneys and interest due upon the mortgage security, and to pay over the surplus moneys (if any) to the mortgagor: (see the form 2 Con. Prec., Part V., Section II., No. I., clause 8, p. 35, 2nd edit.; *ib.* No. II., clause 7, p. 46.)

As to giving mortgagor notice previously to exercising power of sale.—In some forms of power of sale it is stipulated, that the mortgagee shall give the mortgagor six calendar months' notice in writing previously to his exercising the power of sale; but as this may cause questions to arise at some future time, as to whether such notice was duly given, and whether its being so given was, or was not, to form a condition precedent upon which the validity of the exercise of the power is to depend, the best and safest course is to give the mortgagee an immediate power of sale, as in the form above suggested; and in that part of the clause relating to indemnity to purchasers, to declare that the purchaser shall not be affected by any irregularity in the conduct of such sale (see the form 2 Con. Prec., Part V., Section II., No. I., clause 8, p. 36, 2nd edit.), and by way of protection to the mortgagor, the mortgagee should enter into a covenant with the mortgagor not to exercise the power of sale without giving him due notice thereof, but to which should be also superadded a proviso, that such want of notice shall in no wise affect or prejudice purchasers buying under such power of sale: (see the form 2 Con. Prec., Part V., Section II., No. I., clause 18, p. 40, 2nd edit.; *ib.* No. II., clause 13, p. 49.)

Mortgagor's concurrence in a sale under a power in mortgage deed not essential.—With respect to the mortgagor's concurrence in the sale, it was at one time doubted whether a sale without such concurrence would have been binding

in equity ; but all these doubts have not only been long since removed, but it has even been held that a purchaser under a power of sale in a mortgage deed has no right to insist upon the mortgagor's being made a party to the conveyance, and this, notwithstanding there is an express covenant on the part of the latter to concur in the sale (*Clay v. Sharpe*, 18 Ves. 346 ; *Corder v. Morgan*, *ib.* 344), and it seems that if a purchaser were to refuse a specific performance on that account, it would be decreed against him with costs : (Coote Mort. 503 ; 1 Hughes Pract. Mort. 67.)

Objection sometimes raised to powers of sale being annexed to mortgages in fee..]—An objection has sometimes been raised to annexing a power of sale to a mortgage in fee, on the ground that the legal and beneficial interests are transmissible to a different class of representatives, so that if the mortgagee should die, leaving an infant heir, the latter would be unable to exercise the power of sale, as the statutory enactment enabling infant mortgagees to convey only empowers them to convey the dry legal estate ; but this evil is easily surmounted by extending the power of sale to the mortgagee's personal representatives, who will thereby be authorized to sell the property, and then the infant heir, under the direction of the Court of Chancery, may convey to the purchaser : (see the form 2 Con. Prec., Part V., Sect. II., No. I., clause 8, p. 35, 2nd edit.)

As to the application of surplus purchase moneys..]—The surplus purchase moneys, after discharging principal, interest, and costs in respect of the mortgage, are usually directed to be paid over to the mortgagor, his heirs, executors, administrators or assigns, so as to include both his real and his personal representatives ; but sometimes it is directed to be paid to the mortgagor and his personal representatives only ; still, in either case, the money will become payable to precisely the same class of persons ; that is, if the power of sale is not exercised until after the mortgagor's death, the surplus moneys will acquire the character of real estate, and as such descend upon, and become the property of, his heir at law ; but, if the sale is effected in the mortgagor's lifetime, then the surplus will retain the nature of personal property, and be transmissible as such to his personal representatives : (*Wright v. Rose*, 2 Sim. & Stu. 323.) Whenever, therefore, a mortgagor designs that the surplus moneys shall be transmissible to his personal representatives, without reference to the time at which such power

of sale may be exercised, he should expressly declare that it shall be transmissible in that manner. In this respect there is a marked distinction between the operation of a trust, and of a power of sale; for in the former instance there is a constructive conversion in equity of the real into personal estate immediately upon the creation of the trust, so that at whatever time the trust for sale is carried into effect, and as well after the mortgagor's decease, as during his lifetime, the surplus moneys will acquire all the transmissible qualities of personal estate, and in that character, in case of his death, will pass to his personal representatives: (*Vann v. Barrett*, 10 Ves. 1027.)

Power of sale does not destroy right of foreclosure.—It is usual to insert a proviso in mortgages containing a power of sale, that such power shall not deprive the mortgagee of his remedies by foreclosure: but this is not necessary, for as a power of sale may be exercised or not at the discretion of the mortgagee, it is in nowise inconsistent with his right of foreclosure, and he may adopt whichever of these remedies he thinks proper; but it is different in the case of a mortgage upon trusts for sale; because, wherever there is an express trust to sell, there is, as we have just before remarked, a constructive conversion of the property, and the trusts ought literally to be carried into effect accordingly; for trusts are always imperative, but powers are optional; and consequently the latter may be exercised or not at the will and pleasure of the donee of the power.

7. Covenants.

Usual mortgage covenants.—The usual mortgage covenants entered into by a mortgagor in a mortgage in fee are: 1. For payment of principal moneys and interest; 2. That the mortgagor has good right to convey; 3. For quiet enjoyment; 4. For freedom from incumbrances; and 5. For further assurance. If the mortgage is by simple appointment, in exercise of a power, the mortgagor should covenant that such power is a good, valid, and subsisting power, and a covenant that he has good right to appoint should be substituted for the covenant that mortgagor has good right to convey. These are followed by covenants for peaceable enjoyment, freedom from incumbrances, and for further assurance: (see the form 1 Pract. Mort. p. 105, clauses 5 and 6.) The usual covenants on the part of the mortgagee are, that the mortgagor shall enjoy until default;

and, if the mortgage deed contains a power for sale, that the mortgagee will not exercise such power without previously giving the mortgagor six months or some other specified notice. The mortgagor's covenants are always absolute against the acts of all mankind, but those of the mortgagee are merely qualified covenants, binding only upon himself and persons rightfully claiming under him.

Covenant for payment of principal and interest.—The covenant for payment of principal and interest is usually the first covenant contained in the mortgage deed. It should state the precise amount of the principal moneys and interest to be paid, which ought to correspond precisely with the sums mentioned in the proviso for redemption, but it will not be necessary to repeat in express terms the time, manner, or place at which such payment is to be made; it will be sufficient to state "at the time and in manner hereinbefore appointed for payment thereof:" (see the form 2 Con. Prec., Part V., Section II., No. I., clause 10, p. 37, 2nd edit.)

Covenant for payment of interest.—To the above-mentioned covenant it has become a very general practice to annex a covenant that, so long as the principal moneys remain undischarged, the mortgagor will, from time to time, pay the interest thereon, upon some specified days; usually by two equal half-yearly payments: (see the form 2 Con. Prec., Part V., Section II., No. I., clause 11, p. 38, 2nd edit.) The advantage of a covenant of this kind is, that it enables a mortgagee to resort to his remedies for the recovery of any arrears of interest that may be due to him, without interfering with the principal moneys, or the mortgage security itself, in any other respect.

Where the mortgage is to contain a power of distress.—If a power of distress is to be inserted in the mortgage deed, it should come in immediately after the last-mentioned covenant: (see the form 1 Hughes Pract. Mort. 104 *in notis*; 2 Con. Prec., Part V., Section II., No. XIX., clause 10, p. 138, 2nd edit.)

Where the mortgage is to be paid off by instalments.—Whenever a mortgage is to be paid off by instalments, the covenant should be to pay the mortgage debt and interest by the several instalments, in accordance with the terms contained in the proviso for redemption: (see the form 2 Con.

Prec., Part V., Section II., No. VII., clause 8, p. 81, 2nd edit.)

As to mortgages of livings under statute 17 Geo. 3, c. 52.]—In mortgages of livings, however, under the provisions of the statute (17 Geo. 3, c. 52) for providing for the building and repairing of parsonage houses, the covenant for paying off the mortgage debt by several instalments in pursuance of the terms of that act precedes the proviso for redemption, the latter of which provides, that if the mortgage debt and interest be discharged accordingly, the mortgage assurance shall cease and become void: (see the form 2 Con. Prec., Part V., Section II., No. XI., clauses 6 and 7, pp. 90, 91, 2nd edit.)

Mortgages under Benefit Building Societies Acts.]—In mortgages under Benefit Building Societies Acts, the mortgagor covenants to pay his monthly subscriptions, and also the monthly interest upon the mortgage debt: (see the form 2 Con. Prec., Part V., Section II., No. V., clause 10, p. 66, 2nd edit.)

Mortgages under Inclosure Acts.]—In mortgages under Inclosure Acts, the mortgagor covenants, that so long as the principal moneys shall remain unpaid, he, or other the person or persons for the time being entitled to the equity of redemption, will keep down the interest, and pay the same by equal half-yearly payments: (see the form 2 Con. Prec., Part V., Section II., No. VI., clause 10, p. 73, 2nd edit.)

Where the mortgage is to secure future as well as past or present advances.]—Whenever the mortgage assurance is intended to embrace as well future, as past or present advances, the mortgagor should first covenant to pay the principal moneys and interest due upon the past or present advance in the usual form: (see this form 2 Con. Prec., Part V., Sect. II., No. I., clause 10, p. 37, 2nd edit.), and then should further covenant that in case any further advances shall be made, he will repay the same, with interest at the rate aforesaid, from the time at which such advances shall be so made: (see the form 2 Con. Prec., Part V., Section II., No. XI., clause 5, p. 95, 2nd edit.)

Mortgage to secure balance of a banking account.]—Where a mortgage is executed to bankers for the purpose of securing to the latter the payment of the balance of a banking

account, the mortgagor generally covenants that he will, upon receiving some specified notice, pay to the bankers or partnership firm, all such sums of money as shall be due to the latter upon such balance of account and costs incurred in respect thereof: (see the form 2 Con. Prec., Part V., Section II., No. XII., clause 7, p. 100, 2nd edit.)

As to mortgages by husband and wife.—Where husband and wife concur in a mortgage security, as the latter is unable to enter into a covenant, the covenants are entered into by him only, and he covenants for and on behalf of his wife also: (see the form 2 Con. Prec., Part V., Section II., No. XIX., clause 12, p. 139, 2nd edit.)

Trustees not compelled to enter into general mortgage covenants.—Trustees who enter into mortgage assurances, in pursuance of the trusts or powers contained in any deed of settlement, or will, as they take no beneficial interest, cannot be compelled to enter into any covenants for payment of principal and interest, or general covenants for title; all they can be required to covenant for is, that they have done no act to incumber the mortgaged premises: (see the form 1 Con. Prec., Part V., Section II., No. V., clause 3, p. 61, 2nd edit.)

Covenants for title, quiet enjoyment, and freedom from incumbrances.—The covenants for title, quiet enjoyment, and freedom from incumbrances, are worded in much the same manner as in purchase deeds, but with this difference, that being general covenants in mortgage assurances, the qualifying expressions ("notwithstanding any act," &c.) as inserted in a similar covenant in purchase deeds, are always omitted in mortgage assurances: (see the forms 2 Con. Prec., Part V., Section II., No. I., clauses 12, 13, and 14, p. 38, 2nd edit.; *ib.* No. II., clauses 10 and 11, p. 47.)

How covenants for quiet enjoyment and freedom from incumbrances should be penned where brevity is required.—In the covenant for quiet enjoyment, it was formerly the common practice to state, that if default should be made in payment of principal moneys and interest, it should be lawful for the mortgagee to enter upon and hold and enjoy the mortgaged premises, and receive the rents and profits, &c., but all this is perfectly superfluous, and confers no greater right than the mortgagee was otherwise entitled to, it being quite sufficient to covenant that the mortgaged

premises shall be held according to the limitations thereinbefore contained, without eviction or disturbance by any person whomsoever: (see the form 2 Con. Prec., Part V., Section II., No. I., clause 13, p. 38, 2nd edit.; *ib.* No. II., clause 11, p. 47.) And instead of running through the long list of incumbrances sometimes enumerated in the covenant against incumbrances, it will be far better to state briefly that the mortgagee is to hold, free from all incumbrances whatsoever: (see the form 2 Con. Prec. Part V., Section II., No. I., clause 14, p. 38, 2nd edit.; see also covenants for quiet enjoyment and freedom from incumbrances, both contained in the same clause, *ib.* No. II., clause 11, p. 47.)

Covenants for further assurance.]—The covenant for further assurance in a mortgage deed, although a general covenant, is still so far restricted, that the mortgagor only covenants for the acts of persons having rightful claim to the mortgaged premises, for it would be unreasonable to require him to procure the concurrence of every wrongful claimant, who, without the slightest shadow of title, might set up a claim to the property, and over whom the mortgagor could have no possible power or control.

Proviso that mortgagor entering into general covenants in case of sale of mortgaged premises shall be discharged from his absolute covenants.]—To the covenant for further assurance is sometimes added a proviso, that in case the power of sale contained in the mortgage deed shall be exercised, the mortgagor, upon concurring in such sale, and entering into the usual qualified covenants for title, &c., as a purchaser under ordinary circumstances is entitled to require, shall be released from the absolute covenants contained in the mortgage deed: (see the form 2 Con. Prec., Part V., Section II., No. I., clause 16, p. 39, 2nd edit.)

Covenant to insure against damage by fire.]—Where the mortgaged premises, or a considerable portion of them, consists of dwelling-houses, or other valuable buildings, or of property liable to be destroyed or damaged by fire, it is the usual practice to require the mortgagor to insure the premises, and to enter into a covenant to keep the same insured, to the amount of the mortgage debt, or the full value of the mortgaged premises; added to which, the mortgagee, in case of the mortgagor's default in keeping up such insurance, is generally empowered to effect an insurance in his own name, the costs of which are to be a further charge

upon the mortgaged premises, and in case of the premises being destroyed or injured by fire, the moneys to be recovered on account of the insurance are to be applied in liquidation of the mortgage debt and interest: (see the form 2 Con. Prec., Part V., Section II., note B. to p. 48, 2nd edit.) This covenant is generally the last the mortgagor enters into, and is usually preceded by his covenant for further assurance.

Covenant that mortgage deed shall be duly acknowledged.]—Whenever it becomes necessary for the wife of a mortgagor to become a concurring party in a mortgage assurance for the purpose of passing, releasing, or extinguishing any estate, right, claim, or interest which she may possess or be entitled to in the mortgaged premises, it will be necessary for her to acknowledge the mortgage deed, and when such acknowledgment is necessary, her husband ought to covenant that such acknowledgment shall be made accordingly: (see the form 2 Con. Prec., Part V., Section II., No. III., clause A. *in notis*, p. 52, 2nd edit.)

Where mortgagor is to receive a reduced rate of interest in consideration of punctual payment.]—Where the mortgagor is to accept a reduced rate of interest in consideration of punctual payment, a covenant to that effect is sometimes entered into by the mortgagee in substitution for, or in addition to, the proviso to that effect. The proper place for this covenant is at the end of the mortgage deed: (see the form 2 Con. Prec., Part V., No. II., clause C., p. 49, *in notis*, 2nd edit.)

Where mortgage is to secure a banking account.]—Where the mortgage is to secure the balance of a banking account, the bankers should covenant to produce an account on request, and to reconvey the mortgaged premises on payment, which account the mortgagor should covenant to pay off upon receiving due notice: (see the form 2 Con. Prec., Part V., Section II., No. XII., clauses 6 and 7, pp. 99, 100, 2nd edit.)

Covenant to produce title deeds.]—A mortgagee is sometimes induced to enter into a covenant to produce the title deeds, without which the mortgagor can neither compel such production, or oblige the mortgagee to supply him with an abstract of them. A covenant of this kind therefore is particularly important where a large property is in

mortgage, which is designed to be sold in portions or allotments, or granted for building leases, and which, notwithstanding the mortgagor may be authorized to grant by the terms of the mortgage, the mortgagee may have the power of preventing his carrying into effect, by withholding sight of the deeds, and refusing to supply an abstract, without which no title could be shown to the property, and without which few persons would be inclined to become purchasers, or to take leases of it. A covenant of the above kind is usually inserted at the end of the deed after the covenants that the mortgagor shall enjoy until default: (see the form 2 Con. Prec., Part V., Section II., No. I., clause G. *in notis*, p. 42, 2nd edit.)

Not to grant leases without notice.]—Where the mortgagor is to be empowered to make leases, it is also usual for him to covenant that, before granting the same, he will give due notice thereof to the mortgagee: (see the form 2 Con. Prec., Part V., Section II., No. I., clause F. *in notis*, p. 42, 2nd edit.)

8. *Special Powers.*

Special powers adapted to mortgage securities.]—In addition to powers of sale, which are now generally inserted in every mortgage deed, certain special powers are sometimes employed; such as a power to grant leases, which in the absence of an authority of this kind neither mortgagor nor mortgagee can grant so as to be binding with the concurrence of the other: (*Cobb v. Carpenter*; 5 Camp. N. P. C. 13.) Other special powers which are sometimes inserted in mortgage assurances are, to cut down timber, and to appoint bailiffs, receivers, &c.

Powers of leasing, how usually inserted in the mortgage deed.]—Powers of leasing are sometimes inserted immediately after the proviso for redemption, sometimes after the powers of sale; but the proper place seems to be the very end of the deed, after the insertion of all the usual covenants, and to follow the covenant that the mortgagor shall enjoy until default; still, the situation is not very material, if the nature and object of the power itself be clearly expressed.

Where power of leasing is reserved to mortgagor.]—Where the mortgagor is to retain the power to grant leases, the clause creating this power generally provides, that so long as he shall remain in the possession or receipt of the rents

and profits of the mortgaged premises, he may demise the same for some stated period, or for a term not exceeding a certain number of years. As a protection to the mortgagee, it is usually provided that the full yearly rent shall be reserved, and that no fine, premium, or forgift shall be taken as a consideration for the granting of such lease, and that the lessee shall not be made punishable for waste (see the form 2 Con. Prec., Part V., Section II., No. I., clause D., *in notis*, p. 41, 2nd edit.); for without these restrictions, a mortgagor, by granting leases for a long term at a low rent, in consideration of a heavy fine or premium, and at the same time authorizing the lessees to commit waste, might very materially prejudice the mortgagee's interest, and so reduce the yearly value of the profits of the property as to afford means not only inadequate to discharge the mortgage debt, but even to keep down the full amount of interest upon it.

Practical suggestions as to the propriety of requiring mortgagor to give mortgagee written notice previous to every letting.—In some forms, a proviso is inserted stipulating that the terms of the letting shall be communicated in writing to the mortgagee within a certain number of days after the same shall have been made; but as this might possibly raise a question as to the valid exercise of the power if the lessee was to be put to the proof of such notice, the better plan appears to be to omit this latter proviso, and in lieu of it to insert a covenant from the mortgagor not to exercise the power without giving such notice, and at the same time to provide that no lessee shall be in anywise prejudiced thereby: (see the form 2 Con. Prec., Part V., Section II., No. I., clause F., *in notis*, p. 42, 2nd edit.; see also 1 Hughes Pract. Mort., p. 142, *in notis*.)

Where leasing power is to be conferred upon the mortgagee.—If the power of leasing is to be given to the mortgagee, it should be provided that, after default, and so long as the mortgage debt shall remain unpaid, it shall be lawful for the mortgagee to grant leases of the mortgaged premises not exceeding some specified number of years, upon the terms therein specified: (see the form 2 Con. Prec., Part V., Section II., No. I., clause C., *in notis*, p. 40, 2nd edit.; see also 1 Hughes Pract. Mort., clause 7, p. 145.)

Renewal of leases for lives.—In some manors a tenant-right to the renewal of leases exists; and in others, although no such right can be actually established, still it has been

customary to grant renewed leases on the dropping of any of the lives upon the payment of a fine, sometimes arbitrary, at others, a certain fixed sum. Now, most mortgagors who are possessed of large landed possessions are averse to their tenants, or in fact any one else, knowing that their property is so incumbered, and as they cannot renew any leases effectually (unless under a leasing power reserved to them by the mortgage deed) without the mortgagee's concurrence, their attempting to do so, in the absence of such power, would be an act of serious injustice to the tenants, who, as they never require the production of their lessor's title on such occasions, have no direct means of ascertaining that he has incumbered the property, and who, after having paid the fine, and obtained their renewed leases, may still be ejected by the mortgagee, and thus lose all the benefit of such renewal, for which they may have paid many years' actual value of the property. In cases of the above kind, and where the property is otherwise of ample value, it may often be important to reserve a power to the mortgagor to renew such leases so long as he shall continue in the actual possession of the mortgaged premises: (see the form 1 Hughes Pract. Mort. p. 142, clause 2.)

Building leases.—Where the mortgagor is to have a power of granting building leases, the clause usually provides, that it shall be lawful for the mortgagor, as well before as after default in payment, so long as he continues in possession of the mortgaged premises, to grant building leases of the same for some stated period, usually an absolute term of ninety-nine years, or for that term determinable upon three lives; but in order to prevent the mortgagor from deteriorating from the yearly value by reserving a low rent in consideration of a premium or forgift, it is generally stipulated that the lessor shall not take any such premium or forgift for the making of such lease, and that the lessee shall enter into a covenant to pay the reserved rents, and to keep and leave the buildings to be erected on the demised premises in good and tenantable repair, that the lessees shall not be made dispunishable for waste, and that there shall be a proviso for re-entry for breach of any of the covenants in such lease contained: (see the form 1 Hughes Pract. Mort., clause 3, p. 143.)

Power to grant mining setts.—Where a mortgagor is to have a power to grant mining setts, it is usual to provide that the grant shall be subject to such reservations, powers,

and stipulations as are usual in mining setts according to the custom of the country in which the mortgaged premises are situated: (see the form 2 Con. Prec., Part II., Section II., No. I., clause E., p. 41, 2nd edit.)

Power to cut down timber.—Where a mortgagor is empowered to cut down timber, the power is usually restricted to the purpose of repairs upon the mortgaged premises (see the form 1 Hughes Pract. Mort., p. 144, clause 5), and even this is often confined to some specified value, which, if the mortgagor exceeds, such excess is to be considered as waste: (see the form 1 Hughes Pract. Mort., p. 144, clause 6; 2 Con. Prec., Part V., Section II., No. XV., clauses B. and C., pp. 115, 116, *in notis*, 2nd edit.)

Power to appoint receivers.—The clause authorizing the appointment of a receiver is seldom employed except in the case of the mortgage of estates of large value. It may, however, be very concisely penned, simply setting forth that the mortgagee is authorized to employ an agent or receiver to act on his behalf in the execution of the trusts and powers of the mortgage, with such salary or allowance as the mortgagee may think proper, with a power of revoking such appointment whenever he may think proper so to do: (see the form 1 Hughes Pract. Mort., p. 145, clause 8.)

IV. MORTGAGES BY DEMISE.

How mortgages by demise are usually penned.—Mortgages by demise do not usually contain any recitals, unless in those cases where a mortgagor demises in exercise of a power of appointment, in which latter case the deed creating the power is recited; but in other instances the testatum clause immediately follows the description of the parties: (see the form 1 Con. Prec., Part V., Section II., No. IV., clauses 1 and 2, p. 54, 2nd edit.)

Operative words.—The usual operative words in a mortgage by demise are "grant, bargain, sell, and demise," which assurance, when the terms "bargain" and "sell" are both used, operates as a bargain and sale, thus vesting the possession in the mortgagee without entry under the Statute of Uses (27 Hen. 8), and not as a demise at common law; the latter of which, until the entry of the grantee, passes no more than an *interesse termini* in the premises. Some gentlemen have indeed thought proper to exercise a

superabundant degree of caution by stating expressly that the assurances to operate "*by way of bargain and sale taking effect by force of the statute for transferring uses into possession*," in order to prevent the instrument from being by any possibility construed into a demise at common law. There can, however, be no reasonable apprehension of this construction being adopted; for, as a learned writer on conveyancing remarks (Hayes Con. 471, 4th edit.), "an example of a demise or lease operating necessarily and exclusively at common law, cannot very easily be given, because the rent reserved is alone sufficient to raise a use and render the instrument capable of effect as a bargain and sale." In a mortgage, the consideration expressed in the deed must necessarily raise a use, and the mortgagee is presently in possession under the statute without entry.

Where the demise is in exercise of a power.—Where the demise is made in exercise of a power of appointment, the creation of the power ought to be recited (see the form 2, Con. Prec., Part V., Section III., No. VI., clause 2, p. 188, 2nd edit.), and the appointment, in the operative part of the deed, should be expressed to be made in pursuance of such power: (*id. ib.* clause 4, p. 189.) The recital may be inserted in the same form as before pointed out in the case of a conveyance to a purchaser (*ante*, p. 204), or it may be referred to shortly in the granting clause, to the following effect, viz. :

That the said (*mortgagor*) in exercise of a power limited to him by a certain indenture (will or other instrument as the case may be), dated, &c., doth by this present deed appoint, and by way of further assurance, doth by these presents grant, bargain, sell, and demise, &c.

Words of limitation annexed to demise not necessary.—It is not necessary, although the usual practice, to annex words of limitation in the demise to the party, which strictly speaking it is more correct to omit in this part of the deed, and to insert in the habendum, it being the office of the premises to name the grantee and describe the parcels, and of the habendum to limit his estate.

All-estate clause.—The all-estate clause should be omitted in a mortgage assurance by way of demise, being inconsistent with the grant, which is only of a limited interest, and not of the whole estate; still, although incorrect in point of form, it will not substantially affect the assurance, the more extensive operation of which may be controlled by the habendum.

All-deeds clause.—The all-deeds clause ought always to be inserted in a mortgage deed by way of demise, because a termor, for however long a term, and in whatever character, has no right as such to demand the custody of the title deeds, which, properly speaking, appertain to the inheritance: (*Harper v. Faulder*, 4 Mad. 129; *Wiseman v. Westland*, 1 You. & Jerv. 117.)

Reservation of nominal rent.—The render of a pepper-corn, or some other kind of nominal rent, although commonly inserted, is rather a formal than an essential part of a mortgage by demise, the object of its insertion being to raise a use under the statute, but the previous pecuniary consideration set forth upon the face of the deed is amply sufficient for this purpose.

Habendum.—The habendum clause limits the property to the grantee, his executors, administrators, and assigns, for the term thereby demised, and generally adds that his estate shall be without impeachment of waste. A nominal rent, as a pepper-corn, or the like, is often reserved.

Proviso for redemption.—The proviso for redemption in a mortgage by demise usually provides that upon payment of the principal moneys and interest thereby reserved on a certain day therein mentioned the term shall cease; so that, if the condition be performed, the mortgagor will be in possession of his former estate, without the necessity of any reconveyance or surrender of the term.

Operation of the statute 8 & 9 Vict. c. 112, upon satisfied term.—It seems also, since the statute 8 & 9 Vict. c. 112 declares that any satisfied term shall cease, that a receipt from a mortgagee, acknowledging satisfaction of the mortgage debt, where a mortgage has been effected by way of demise or underlease, will operate as a cesser of the term, and that there will consequently be no necessity for either a surrender or assignment of the mortgaged premises to reinvest the mortgagor or other owner of the reversion, notwithstanding the estate of the mortgagor has become absolute in consequence of the mortgagor's default in payment of the principal and interest on the day appointed.

Power of sale.—A power of sale, similar to such power in a mortgage in fee, may be inserted in a mortgage by demise, with this simple difference, that in the latter case,

the power ought to be restricted to be exercised by the mortgagee or his personal representatives only, and to the term for which the premises are demised.

Usual covenants in a mortgage by demise.—The usual covenants are for payment of principal moneys and interest; that the mortgagor has good right to demise; for quiet enjoyment, freedom from incumbrances, and for further assurance. Other covenants and special stipulations, powers and provisoes, may be annexed to mortgages of the above kind, in the same manner as in mortgages in fee simple.

V. MORTGAGES OF ENTAILED PROPERTY.

Entailed property not a marketable mortgage security.—Entailed property cannot, so long as the entail remains unbarred, be considered a marketable mortgage security; unless such a mode of assurance be authorized by some power in the settlement by which the estates tail were originally created. Still, if there be no protector to the settlement, or being such, if his consent can be obtained, the tenant in tail may then bar his own estate tail, and all remainders expectant thereon, and thus create an absolute estate in fee simple; but should there be a protector to the settlement, and he refuses to consent, the tenant in tail can only bar his own estate tail, and thereby create a base fee determinable upon failure of his own issue, with power at any future time, in case there should cease to be a protector, to convert such base fee into a fee simple absolute.

Proper course to adopt for effecting mortgages of entailed property.—When entailed property is designed to be mortgaged, and the tenant in tail has the absolute power to bar the entail, or can obtain the consent of the protector for that purpose, the best course is to bar the entail by a separate deed, in the same way as upon a purchase (as to which see *sup.* p. 225, *et seq.*), and having acquired an absolute estate in fee simple, to execute a mortgage assurance of that estate in the same manner as of any other fee simple estate.

Disentailing assurance and mortgage may both be contained in same instrument.—If the parties really desire it, the disentailing assurance may form part of the mortgage deed, so that both assurances may be contained in the same

instrument; but it is, for the reasons suggested in a former part of the present work (*ante*, p. 255), a far better plan to have the two distinct instruments of assurance.

When a tenant in tail is unable to procure the protector's consent.—When a tenant in tail desirous of mortgaging is unable to obtain the protector's consent to the assurance, the best security the former can offer under these circumstances is a conveyance of his base fee, accompanied with a covenant to perfect the title at some future period, to which may be added a policy of assurance upon the life of the tenant in tail, which should be assigned by way of collateral security: (see the form 1 Hughes Pract. Mort., D. No. VI., p. 184.)

Course to adopt where entail in equity of redemption is not designed to be barred.—It sometimes happens, where a mortgage is to be effected of entailed property, that it is desirable the equity of redemption should still remain subject to the entail. When this occurs, the proper course will be to limit the estate for a long term of years, by which means the entail will only be barred so far as the mortgage extends, whilst the equity of redemption will remain in the same plight as it stood in previously (stat. 3 & 4 Will. 4, c. 74, s. 21), and upon the mortgage being satisfied, the term will cease under the provisions of the act (8 & 9 Vict. 112), as to which see *ante*, p. 361.)

Mortgage in fee an effectual bar of entail in equity of redemption.—But where the mortgage is in fee, it will be an effectual bar to the entail in the equity of redemption, notwithstanding it should be declared in express terms, that the assurance is to operate as a mortgage only, and that the limitations contained in the settlement creating the entail as far as the equity of redemption is concerned, are to remain as before; for the 21st section of the Fine and Recovery Act (3 & 4 Will. 4, c. 74), expressly enacts "that if a tenant in tail of lands shall make a disposition of the same under this act by way of mortgage, or for any other limited purpose, then and in such case such disposition shall, to the extent of the estate thereby created, be an absolute bar in equity as well as at law, to all persons against whom such disposition is by this act authorized to be made, notwithstanding any intention to the contrary may be expressed or implied in the deed by which the disposition may be effected." There is good reason, however, to contend

that if the mortgage assurance is declared to be void on performance of the condition, such performance would restore the original estate, and thus revive the entail; and it has therefore been suggested, that if a mortgage is intended to operate as a disentailing assurance, the proviso for redemption should direct a reconveyance, instead of providing that the deed shall become void on performance of the condition.

VI. MORTGAGE OF AN EQUITY OF REDEMPTION.

General practical suggestions.]—Whenever an equity of redemption is mortgaged, the solicitor of the second mortgagee should take care to ascertain that the original mortgage assurance is not made to cover further advances. The most satisfactory way of discovering this would be by an inspection of the mortgage deed itself. But if the first mortgagee, upon being questioned, was to reply that the first mortgage did not extend to future advances, or was to say that a lesser sum was due thereupon than was actually the fact, he would be bound by his statement; and this, upon the long established principle of equity, that if a man, by the suppression of truth, which he was bound to communicate, or by the wilful suggestion of a falsehood, be the cause of a prejudice to another who had a right to a full and correct representation of the fact, such a fraudulent course of proceeding shall postpone his claim to that of the person whose confidence was abused by his misrepresentation: (*Fox v. Macreth*, 2 Bro. C. C. 240; 1 Fonb. Tr. Eq. 146 n. a.) Neither will it be sufficient for a second mortgagee to rest satisfied even when he has discovered what is the amount of the sum actually secured by the prior mortgage. It will be requisite for him also to find out whether the mortgagor may not have mortgaged some other property to the first mortgagee, which may be still subsisting; for if such be the case, the mortgagor will not be allowed to redeem the one without the other, a rule equally binding upon a subsequent mortgagee, as upon the mortgagor himself. Neither will the circumstance that the one mortgage is of real, and the other of personal property in the slightest degree vary this rule: (*Shuttleworth v. Laycock*, 1 Vern. 245; *Willie v. Lloyd*, 2 Eden, 78.)

Advantages of making first mortgagee a party.]—It will be advisable, whenever it can be so arranged, to make the first mortgagee a party to the second mortgage, and to

prevail upon him if possible to enter into a covenant to deliver over the title deeds to the second mortgagee, in case the prior mortgage should be paid off. It will also have this additional advantage, that it will give the first mortgagee express notice of the whole nature of the transaction, and dispense with any other notice being given him.

Practical directions for preparing the mortgage of an equity of redemption.—The mortgage deed of an equity of redemption should always recite the first mortgage, the amount of principal and interest thereby secured, as also how much thereof is then owing upon the mortgage security, and that the advance thereby made, and security thereby intended to be given, is to be subject to the pre-existing mortgage; the property should be then conveyed to the second mortgagee, with proviso for redemption, power of sale, and all other usual mortgage covenants, but all subject and without prejudice to the prior mortgage security; and in addition to the other usual covenants, the mortgagor should also covenant that in case the pre-existing mortgage shall at any future time be paid off, the title deeds shall be delivered to the second mortgagee: (see the form 2 Con. Prec., Part V., Section II., No. XVII., pp. 121, 127, 2nd edit.)

Where first mortgagee is made a concurring party.—If the first mortgagee is a concurring party, he should be the last party named, and he should neither convey nor confirm, or in fact concur in any other manner in the assurance, except that where he is to covenant to produce the title deeds, he should enter into such covenant accordingly; the proper place for inserting which is at the very end of the deed after the covenants from the second mortgagee, that the mortgagor shall enjoy until default, and not to exercise power of sale without giving the latter due notice thereof: (see the form 2 Con. Prec., Part V., Section II., No. XVII., clauses A. and B. *in notis*, pp. 125, 126, 2nd edit.)

Where original mortgagee is not a party, second mortgagee should give him immediate notice.—If the first mortgagee is not made a party, the second mortgagee should immediately upon completing the mortgage give the former due notice thereof: (see the form 2 Con. Prec., Part V., Section XII., No. XIII., p. 440, 2nd edit.), otherwise the first mortgagee, that is, supposing him to have the legal estate, would be enabled, in the absence of any such notice, to tack

any subsequent advance he might make to his original mortgage security, which would overreach the intermediate mortgage, of which the prior mortgagee had no notice at the time he made such further advance: (*Wrightson v. Hudson*, 2 Eq. Cas. Abr. 609, pl. 7.) But the first mortgagor will not be entitled to this preference, unless he has also the legal estate in him; for if it be outstanding in a third party, then both the equities will be equal, so that it is only throwing the legal estate into the scale, that the first mortgagor's advance would be entitled to a priority: (*Brace v. Duchess of Marlborough*, 2 P. Wms. 494.)

Mortgagor should give immediate notice of second mortgage to prior mortgagee.—The mortgagor should also give immediate notice of the mortgage to the prior mortgagee, otherwise he will risk losing his right of redemption: (stat. 4, Will. & M. c. 160.) The best mode of giving such notice is to forward the prior mortgagee an attested copy of the second mortgage deed.

Distinction between an equity of redemption and a legal reversion expectant on a mortgage term.—It may not be improper in this place to remark, that there is a distinction between an equity of redemption, and a legal reversion expectant on a mortgage term; the former being equitable, the latter legal assets, so that a mortgage in fee, although expectant on a long term of years, will take precedence of mere equitable incumbrances; hence, whenever the first mortgage is only for a term, the solicitor for the second mortgagee should always insist upon having a conveyance of the legal reversion expectant thereon; still, this will not prevent the mortgagee of the term from tacking any future advances where he has no notice of the second mortgage; it will, therefore, be quite as necessary for the mortgagee of the legal reversion to give the prior mortgagee notice of his mortgage, in a case like the present one, as in the case of a mortgage of the simple equity of redemption: (*Brace v. Duchess of Marlborough*, *sup.*)

CHAPTER III.

MORTGAGES OF CONTINGENT, EXECUTORY, AND REVERSIONARY ESTATES AND INTERESTS; ESTATES FOR LIFE; TERMS OF YEARS; AND OTHER UNCERTAIN INTERESTS.

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- I. MORTGAGES OF CONTINGENT, EXECUTORY, AND REVERSIONARY ESTATES AND INTERESTS.
 - II. MORTGAGES OF ESTATES FOR LIFE.
 - III. ESTATES PUR AUTRE VIE, FOR YEARS DETERMINABLE ON LIVES, AND FOR TERMS OF YEARS ABSOLUTE.
 1. Mortgage of an estate *pur autre vie*.
 2. Mortgages of estates for years absolute, and for terms of years determinable on lives.

- I. MORTGAGES OF CONTINGENT, EXECUTORY AND REVERSIONARY ESTATES AND INTERESTS.

Contingent estates do not afford a marketable title.—We have already noticed (*ante*, p. 72), that contingent and executory estates do not afford a marketable title; and that even whether they will confer a safe holding title or otherwise will entirely depend upon the individual circumstances of each particular case. If the contingency upon which the estate is to determine is an event likely to happen; as in the case of a devise in fee, subject to a limitation over by way of executory devise on the decease of the devisee without leaving issue at the time of his or her decease, and such devisee has no issue, or the probability of ever having any, this, although nominally

a fee simple estate, is in reality no better than a mere life estate, and probably a very uncertain one; whilst if he has issue, the test, as to its safety as a holding title will depend upon the probability of such issue surviving their ancestor. In either case, however, if the property is of adequate value, it may be rendered an available mortgage security, in the first place by effecting an assurance in the amount of mortgage money, upon the life of the devisee of the contingent estate, and in the other by effecting a like assurance upon the life of any one of the issue; for if any one of the latter should survive the ancestor, then his contingent fee simple estate would become absolute, and the mortgagee would thus acquire a perfect title to the premises.

When mortgagees may safely rely on a mere covenant to assure lives..]—In those cases, indeed, where the proposed mortgagor has many children or other numerous issue, a mortgagee may often safely rest satisfied with a covenant from the former to effect an assurance upon the lives of some one of his issue at the mortgagee's request, with power for the latter to do so in case of default, and to charge the expenses by way of further charge upon the mortgaged premises.

As to estates in remainder or reversion..]—Estates in remainder or reversion form a very indifferent mortgage security, as they neither yield an immediate right to the possession, or afford an existing fund for discharging either principal or interest; added to which the mortgagee, having no right to the custody of the title deeds, is liable to take subject to incumbrances he may be altogether ignorant of; still, if a mortgagee is content to advance his money upon a security of this nature, he has a perfect legal right to do so.

How mortgage of a reversionary estate should be made..]—The proper mode of assurance for effecting a mortgage of an estate in remainder or reversion, is by a deed of release, which was indeed the proper mode of conveyance even before the lease for a year was dispensed with by the recent act (4 Vict. c. 21); for such lease for a year, which preceded the deed of release, purporting to confer the actual possession, was clearly inconsistent with the conveyance of an estate in remainder or reversion.

Suggestions as to framing mortgages of reversionary interests..]—In mortgages of reversionary interests, although

it is a common practice to insert a power of sale, still, as property of this kind is not very saleable, it is often arranged that the time of previous notice to the mortgagor shall be extended beyond the usual limit required in mortgages of estates in possession. Sometimes, also, it is provided that the mortgagee will not call in his money until some fixed time, provided the mortgagor in the interim pays the interest regularly at certain stated periods; an arrangement which, whilst it protects the mortgagee so long as his interest is punctually discharged, protects also the mortgagor from the heavy loss he might otherwise incur by a premature sale of the property, before it either falls into possession, or is enhanced in value by the effluxion of time rendering the prospect of such possession more immediate: (see the form 1 Huges Pract. Mort., F. No. I., 228.)

Reversionary interests often included with other property to make up value of mortgage security.]—Reversionary estates, although considered as an inadequate security, are often included with estates in possession in the same mortgage assurance for the purpose of strengthening the whole security in those cases where a considerable advance has been made in proportion to the value of the other portions of the property. Whenever this occurs, it should always be provided in the power of sale, that the property in possession shall be first sold for the purpose of satisfying the mortgage, before any portion of the reversionary property shall be applied to that purpose: (see a form that may be adapted for this purpose, 2 Con. Prec., Part V., Section VII., No. II., clause 16, p. 314, 2nd edit.)

As to contingent, executory, and reversionary interests.]—Contingent, executory, and reversionary interests afford even a worse mortgage security than the reversionary estates we have just before been treating of, as from their contingent nature, they may, instead of becoming vested interests, fail of effect altogether. Upon the probability of the happening of the contingency upon which the estate is to become vested, the safety of the security must therefore depend. The chance of its vesting may be a very remote one; as depending on failure of issue of a person in his lifetime, who may be advanced in years, and have one or more children or other issue, or such chance may be beyond the hope of possibility, as where such issue are numerous, with every probability of an increase; or on the other hand, the con-

tingent estate may be to all intents and purposes equal to a vested estate in remainder ; as where it is limited to take effect on failure of issue of a childless old woman, who has long passed the age of child-bearing.

Where the limitation over depends upon the happening of two contingent events.—Sometimes the limitation over, by way of executory devise, is made to depend upon the executory devisee being living at the time of the decease of the first taker without issue. In this case, the vesting of his estate will depend upon the happening of two contingencies ; first, the death of the first taker without issue, and secondly, the executory devisee being living at that time. To guard against the latter consequences, the best plan is to effect a policy of assurance upon the life of the executory devisee, which must be assigned to the mortgagee by the same deed by which the mortgaged property is conveyed to him, and the mortgagor must covenant to keep up the policy, with power for mortgagee to renew and keep up the same in case of mortgagor's default, accompanied by a stipulation that all costs thereby incurred shall become a further charge upon the mortgaged premises : (see the form 1 Hughes Pract. Mort., Prec. F., No. III., p. 236.) The mortgagor should be authorized to effect or renew the policy, either in the same, or in such other assurance office as he may think proper, in order to guard against the consequences of the policy having been allowed to drop for want of being renewed in proper time, and the office refusing to renew again upon the original terms, or perhaps to renew the policy at all, if the life has become an unhealthy one ; whereas, provided a sufficient amount of premium be paid, there are several responsible offices that will undertake to assure even unhealthy lives. It should also be provided that it shall be optional with the mortgagee to effect or renew such policy or not, as he may think proper, to prevent the possibility of the mortgagor setting up any claims against him for allowing the policy to expire, or neglecting to renew the same : (see the form 2 Con. Prec., Part V., Section III., No. II., clause F., p. 169 *in notis*, 2nd edit.)

II. MORTGAGES OF ESTATES FOR LIFE.

An estate for life, although larger in the eye of the law than an estate for years, for however long a term, affords in reality a much smaller mortgage security, from the certainty of the duration of the term, and the absolute uncertainty of

the duration of human life, so that, if the term of years is of any considerable length, as ninety-nine years for instance, it is sure to endure for a longer period of time than an estate determinable on the death of ninety-nine lives, or even of double that number, provided all of them were in existence at the time of creating the estate. It is, indeed, a singular anomaly in the law, that a life estate is theoretically treated as a larger interest than a term of 1000 years; whilst, for most practical purposes, as in the act of Parliament authorizing tenants in tail to grant leases (32 Hen. 8, c. 28), three lives are only considered as equivalent to a term of twenty-one years. Under any circumstances, indeed, the existence of human life is altogether so uncertain, that no reasonable amount of interest reserved can often compensate a mortgagee for the risk he incurs by advancing money on property depending upon so precarious a tenure. Still, for all this, an estate for life producing a good annual rental, may often, with the addition of a policy of assurance upon the life of the tenant for life assigned by way of collateral security, be rendered a safe investment: (see the form 2 Con. Prec., Part V., Section III., No. IV., p. 177, 2nd edit.)

How the estate should be limited to the mortgagee.—As a tenant for life can only grant an estate commensurate with his own interest in the premises, the grantee of such interest will become tenant *pur autre vie*, his estate being determinable with the life of the grantor. The property, therefore, should be limited to the mortgagee during the life of the mortgagor, subject to redemption at the time mentioned in the mortgage deed. A policy of assurance must of course form part of the security, and be assigned by the mortgage deed, which must contain a covenant to keep up the policy, in the way we have pointed out in the previous section: (*ante*, p. 368.) The deed should also contain the usual powers of sale and mortgage covenants: (as to which see *ante*, pp. 348, 350.)

Where the mortgage debt is to be paid off by instalments.—It sometimes happens that a small sum only is raised by way of mortgage secured upon property producing a large rental, and it is provided that the mortgage debt shall be paid off by instalments, either yearly, half-yearly, or at some other stated periods, and that so long as such instalments are duly paid, the mortgagee will neither exercise the power of sale, or foreclose the equity of redemption of the mortgaged

promises: (see the forms 1 Hughes Pract. Mort., Prec., G., No. I., p. 251; 2 Con. Prec. Part V., Section III., No. IV., pp. 177, 181, 2nd edit.)

III. ESTATES *PUR AUTRE VIE*, FOR YEARS DETERMINABLE UPON LIVES, AND FOR TERMS OF YEARS ABSOLUTE.

1. Mortgage of an estate *pur autre vie*.
2. Mortgages of estates for years absolute, and for terms of years determinable on lives.

Estates determinable upon lives are of two kinds: estates determinable upon lives, and estates for years determinable upon lives. The former of these is termed an estate *pur autre vie*, which estate sometimes possesses the qualities of real, sometimes of personal estate, depending entirely upon the mode by which the property is limited; if limited to the grantee and his heirs, it will pass a freehold interest, which will descend upon his heir; if limited to the grantee, his executors and administrators, or no words of limitation are annexed to the grant, it will pass a mere chattel interest that will be transmissible to his personal representatives: (29 Car. 2, c. 3, s. 12; 14 Geo. 2, c. 2; *Ripley v. Waterworth*, 7 Ves. 425.)

Estates for years determinable on lives.—Estates for a term of years determinable upon lives can pass no more than a chattel interest, and therefore, if such an estate were to be granted to a party and his heirs, it would be inconsistent with the nature of the estate, which, notwithstanding it is limited to the heirs, would nevertheless be transmissible to the personal representatives.

As to right of renewal of lease for lives.—In some leases for lives, or for years determinable on lives, there is a perpetual, or tenant-right of renewal; in others, the right of renewal rests only on a covenant to grant a fresh lease on the dropping of any of the lives upon payment of a certain sum by way of fine, but which does not contemplate future renewals; whilst in others, although the tenant right of renewal is not absolute, it has been so long customary to grant such renewals, that there is no reasonable ground to apprehend but that such renewals may always be obtained upon the usual and accustomed terms. The eligibility of property of this nature for a mortgage security will therefore depend in some measure upon the right of renewal, and how far such right can be secured; and where no such right

exists, upon the number, age, and health of the lives upon which the lease is determinable. If there is no perpetual right of renewal, the lives of at least one of the persons upon whom the lease is determinable should be assured, and the policy assigned to the mortgagee (see the form 2 Con. Prec., Part V., Section III., No. II., clauses A., B., C., E., and F., pp. 165, 166, 169, 2nd edit.; *ib.* No. III., clauses 5, 8, and 9, pp. 174, 175); and even where there is a perpetual right of renewal, one of the lives should be assured, if not to the amount of the mortgage debt, at any rate to an amount sufficient to cover the fine and expenses incidental to the renewal of the lease.

Disadvantages incidental to mortgages of estates determinable upon lives.—One great disadvantage incidental to estates determinable upon lives is, that the parties upon whose decease the estate determines often settle in distant places abroad, so that it is often difficult, and sometimes impracticable, to ascertain whether they be really living or dead, and if unheard of for seven years they will then be presumed as dead: (stat. 19 Car. 2, c. 6, s. 2; *Doe ex dem. Lloyd v. Deakin*, 4 B. & Ald. 443; *Doe dem. Jesson v. Jesson*, 6 East, 85.) Still, for all this, if it should afterwards appear that they are really alive, the parties deprived of their estates by reason of such presumed death will be entitled to recover possession of the property and damages for the profits during all the time they were so dispossessed: (sect. 5.) Another disadvantage attending property of the above kind is, that upon any of the lives going abroad into distant foreign countries, or unhealthy climates, a policy of assurance effected on their lives will thereby become forfeited; to guard against which, a mortgagor, in addition to the ordinary mortgage covenants, is frequently required to enter into a special covenant that the party whose life is so assured shall not do any act whereby the policy may become vacated or prejudiced (see the form 1 Hughes Pract. Mort., Prec. G., No. VI., clause 13; 2 Con. Prec., Part V., Sect. III., No. IV., clause 14, p. 181, 2nd edit.), and also that the party whose life is or is to be assured, will, whenever thereunto requested by the mortgagee, attend at the assurance office, and give such information respecting his age, health, or otherwise, as may be requisite to obtain an assurance upon his life: (see the form *id. ib.* clause 13.)

Assurance offices inclined to act more liberally now than in former times.—It may be proper, however, to remark, that

insurance offices at the present day are inclined to act far more liberally than in former times, and can often be prevailed upon, where the lives assured are desirous of going abroad, to continue the policy upon receiving an increase of premium; and some offices, as the Law Property and Life Office, for instance, will grant assurances upon the lives of persons residing even in unhealthy climates.

1. *Mortgage of an Estate pur autre vie.*

How mortgage of an estate pur autre vie should be penned.]—The proper mode of assurance in a mortgage of an estate *pur autre vie* is by a deed of grant and release, conveying the property to the mortgagee accompanied by the assignment of a policy of assurance upon one or more of the lives. The deed should contain a proviso for redemption, power of sale in default, and the usual mortgage covenants, viz., for payment of principal and interest, that mortgagor has good right to convey, for quiet enjoyment and freedom from incumbrances, and for further assurance; in addition to which the mortgagor must covenant to keep up the policy of assurance, and authorize the mortgagee to effect the same in case of his default, in the manner we have just before mentioned. And the mortgagor should enter into the usual covenants that the mortgagee shall enjoy until default, and not to exercise power of sale without giving the latter previous notice thereof.

2. *Mortgages of Estates for Years absolute, and for Terms of Years determinable on Lives.*

What modes of assurance may be adopted.]—Mortgages of estates held for a term of years, whether absolute or determinable upon lives, may be effected either by way of assignment of the whole term, or by way of underlease.

As to the preferable mode of assurance in mortgages of leaseholds for years.]—In mortgages of estates held for a term of years, whether absolute or determinable on lives, a preference is generally given to mortgages by way of underlease, in order to protect the mortgagee against the rents and covenants of the lease, which, in the character of assignee of the whole estate in the term, he would otherwise be liable to pay and perform (*Palmer v. Edwards*, Doug. 187; *Burton v. Barclay*, 7 Bing. 745); but which, if he takes the property

as an underlessee, he will be entirely free from: (*Holford v. Hatch*, Doug. 182; *Cosser v. Collinge*, 3 Myl. & Kee, 283.) Still, in some instances, an assignment of the whole term will be a preferable mode of assurance; as where, instead of imposing a burden, it will confer a benefit by creating a privity of estate between the assignee of the term and the lessor; as where a low or merely nominal rent is reserved, and no burdensome covenants are imposed on the lessee, whilst the covenants on the part of the lessor are highly beneficial to the tenant's interests; as a covenant for renewal, or the like, which a mere underlessee would be unable to enforce for want of privity of estate between them.

How mortgage by way of assignment should be framed.—In mortgages of a term by way of assignment, it will be proper to recite the original lease by which the term was created, in precisely the same manner as upon an absolute sale (see the form 1 Con. Prec., Part II., Section II., No. I., clause 2, p. 243, 2nd edit.); and if the lease is renewable, a recital to that effect must also be inserted (see the form 1 Con. Prec., p. 243, note A., 2nd edit.); but, unless there have been any dealings with the term by which the relation of the mortgaging parties may be affected, it will be sufficient to refer very briefly to the mesne assignments, however numerous they may have been, as, "that by virtue of divers mesne assignments, &c., and ultimately, by the last assignment, the premises were assigned unto and became vested in the mortgagor." If there has been but one assignment, namely, from the original lessee to the mortgagee, then this assignment must be recited accordingly: (see the form 2 Con. Prec., Part V., Section III., No. III., clause 3, p. 174, 2nd edit.) If the lease is determinable on lives, and a policy of assurance is to be assigned, the recital that such policy has been effected should also be inserted. This may be done either before or after the recital of the agreement for the loan; but the best way of explaining the intention of the parties is to recite, first, that the mortgagee has, upon the application of the mortgagor, agreed to make the advance, and that, upon the treaty for the loan, it was agreed that the mortgagor should effect the policy, which he has accordingly done: (see the form 2 Con. Prec., Part V., Section III., No. III., clauses 4 and 5, p. 174, 2nd edit.) The mortgagor should then assign the mortgaged premises in precisely the same terms as upon an absolute sale. The parcels may be set out and described at length, either in this place, or in the recital of the original lease, or in a schedule annexed to the

mortgage deed. In fact, in the granting clause, operative words, description of parcels, general words, all-estate clause, and all-deeds clause, there is no difference whatever between the form of an assignment by way of absolute sale, or by way of mortgage; so that all the observations we have made in a former part of the work relating to the one will be equally applicable to the other, and thus render any further remarks on the subject in this place altogether superfluous.

Habendum.—The habendum clause should be sufficiently comprehensive to embrace all the mortgagor's interest in the term, otherwise it will pass a mere underlease. It must also be adapted to the estate which is assigned. If, therefore, the term is an absolute term of ninety-nine years, for instance, it should be for all the unexpired residue of the said term of ninety-nine years; to which is often superadded the expressions, "and for all other the estate, term, and interest of him the said (*mortgagor's name*) therein." If the lease is for years determinable on lives, then the clause should run, "for all the unexpired residue of the said term of ninety-nine years determinable as aforesaid;" and if a right of renewal is to pass, then between the words "determinable" and "as aforesaid," should be inserted, "and renewable." It must also be stated that the mortgagee is to hold the mortgaged premises indemnified by the mortgagor against the rents and covenants contained in the original lease thereof, but subject nevertheless to the proviso for redemption thereafter contained: (see the form 2 Con. Prec., Part V., Section III., No. II., clause 4, p. 166, 2nd edit.)

Where a policy of assurance is assigned.—If a policy of assurance is assigned, the assignment should come in after the habendum clause of the mortgaged property, followed by the habendum of the policy, and short form of power of attorney to sue for and give receipts for the money recoverable thereupon: (see the form 2 Con. Prec., Part V., Section III., No. III., clauses 8 and 9, pp. 175, 176, 2nd edit.) Then should follow the proviso for redemption, and powers of sale in default; to which may be superadded, if the parties think proper, powers to grant underleases, either by the mortgagor or mortgagee, or any other powers which are not inconsistent with the estate and interest which the mortgagor, and the mortgagee through him, takes in the mortgaged premises; but the latter kind of powers, as in the case of a mortgage in fee simple, are best inserted after the covenants,

so as to come in at the very end of the mortgage deed: (see the forms 2 Con. Prec., Part V., Section II., No. I., clauses C. and D., *in notis*, pp. 40, 41, 2nd edit.) A power of distress may also be inserted, if it is intended that the mortgagor shall continue in possession of the mortgaged premises: (see the form *id. ib.* p. 16, clause A., *in notis*.)

Usual covenants contained in a mortgage by assignment.—The usual covenants on the part of the mortgagor, where the mortgage is by way of assignment, are, absolute covenants for payment of principal and interest; that the original lease is a valid and subsisting lease; that all outgoings, such as rent and taxes, have been duly paid, and all covenants and conditions on the lessee's part duly performed; and that the mortgagor will at all times thereafter pay and perform the same, so that the mortgagee may at all times thereafter be kept effectually indemnified therefrom; that the mortgagor has good right to assign; for quiet enjoyment; freedom from incumbrances, and for the further assurance: (see the form 2 Con. Prec., Part V., Section III., No. II., clauses 6 to 10 inclusive, pp. 167, 168, 2nd edit.)

Where a policy of assurance is assigned.—If a policy of assurance is assigned, the mortgagor must covenant to keep it up, with power for the mortgagee to effect or renew such policy in default of mortgagor's doing so, in the way we have already pointed out (*ante*, p. 370): (see the form of mortgage by way of assignment, 2 Con. Prec., Part V., Section III., No. II., p. 164, 2nd edit.)

Where the lease contains a covenant or proviso for renewal. If the original lease contains a covenant or proviso for renewal, the mortgagor should be authorized to effect such renewal, and to charge the fine, and all other incidental expenses, together with interest thereon to the same amount as reserved upon the mortgage, by way of further charge upon the mortgaged premises; with a further covenant from the mortgagor to repay the mortgagee upon demand all such sums as the latter shall so expend, with interest at the rate aforesaid from the time of such expenditure. This will render the mortgagor personally liable for the amount, and thus enable the mortgagee, in case of non-payment, to support an action at law against the mortgagee for its recovery: (see the form 2 Con. Prec., Part V., Section III., No. II., clause D. *in notis*, p. 168, 2nd edit.)

Mortgages by way of underlease.—It is the usual practice in a mortgage, by way of underlease, to recite the original lease and mesne assignments (if any) and all other dealings and transactions relating to the term, in precisely the same manner as upon a mortgage by way of assignment; and after reciting the agreement for loan, the term should be demised to the mortgagee, To HOLD to him for all the residue thereof, except some small reversion; and for this purpose the reservation of the last day, or even hour of the term will be sufficient to make the assurance operate as an underlease, and not as an assignment: (*Holford v. Hatch*, Doug. 182.) The proviso for redemption should be next inserted, to which powers of sale may be added, and also the usual general mortgage covenants from the mortgagor for payment of principal and interest; that the lease is a valid one, and the mortgagor lawfully possessed of the term; that he will pay the rents, perform the covenants, and keep the mortgagee indemnified therefrom; that he has good right to demise; for quiet enjoyment; freedom from incumbrances, and for further assurance.

Where the lease is determinable on lives.—Where the lease is determinable on lives, a policy of assurance upon one at least of the lives should be assigned by way of collateral security, which assignment ought to be inserted in the mortgage deed, in the same manner as in the case of mortgage, by way of actual assignment of the whole term, and contain precisely the same covenants for renewing and keeping up the policy as are contained in the last-mentioned mode of assurance: (see the form 2 Con. Prec., Part V., Section III., No. II., clauses B. and C., pp. 165, 166, *in notis*; *id. ib.* clauses E. and F., *in notis*, pp. 169, 170.)

Mortgage of an equity of redemption of leasehold.—Where an equity of redemption of leaseholds is mortgaged, the original mortgage must be recited, and also the amount of principal and interest due upon the mortgage security. Then the agreement for loan must be recited, and the mortgagor must assign or demise the mortgaged premises to the new mortgagee, either for the residue of the whole term, in case the assurance is by assignment, or excepting a small reversion, where it is by way of underlease, subject to the pre-existing mortgage; with a proviso for redemption, power of sale in default of payment, and the usual mortgage covenants contained in an ordinary mortgage by way of assignment or underlease, but all subject, and without prejudice, to the pre-existing

mortgage security: (see the form 2 Con. Prec., Part V., Section III., No. VII., p. 191, 2nd edit.)

Where the lease contains a proviso or covenant against assigning or underletting without a lessor's licence.—If the original lease contains a proviso or covenant against the lessee assigning or underletting without licence, the making an assignment or underlease by way of mortgage will be equally a breach of the proviso or covenant, as if made upon an actual sale to a purchaser. In mortgages of property so situated, the lessor's licence is indispensable to the validity of the assurance, and it must also be recited in the mortgage deed that such licence has been duly obtained (see the form 1 Hughes Pract. Mort., Prec. G., No. VII., clause 5); and such licence must be delivered over to the mortgagee with the other title deeds and documents on the execution of the mortgage.

CHAPTER IV.

MORTGAGES OF COPYHOLD OR CUSTOMARY ESTATES.

Mortgages of copyholds, how effected.—Mortgages of copyhold estates are usually effected either by an actual surrender, with a condition or defeasance annexed thereto for avoiding the surrender on payment of principal and interest upon some appointed day; or by a simple covenant of the mortgagor to surrender to the mortgagee's use; added to which a bond is sometimes given by the mortgagor by way of an additional collateral security. But a copyholder cannot make a mortgage by demise, being unable to create such an interest without the licence of the lord, and his attempting to do so would be a forfeiture of his estate: (*Mathews v. Wheaton*, 6 Vin. Abr. 112.)

Advantages of an actual surrender.—As the legal estate in copyholds can only pass by an actual surrender and admission, this mode of assurance necessarily affords the safest and most eligible security.

How and when surrender may be made.—The surrender may be made either at a general or a special court; or in most, if not in all manors, it may be made out of court to the steward or his deputy, or before the tenants of the manor, if such be the custom; but it seems that a surrender by attorney cannot be out of court: (*Mitchel v. Neale*, 2 Ves. 679; Scriv. Cop. 156, 3rd edit.)

How surrender should be expressed to be made.—The surrender should be expressed to be made upon condition to be void upon payment of principal and interest on a given day: (see the form 2 Con. Prec., Part V., Section IV., No. I., p. 195, 2nd edit.) The defeasance may be, and in fact often is, made by a separate instrument: (see the form 2 Con. Prec., Part V., Section IV., No. V., p. 210, 2nd edit.) The disadvantage attending the latter plan is, that if the defeasance should happen to be lost, the mortgagor might find some difficulty in proving the condition, whilst

the surrender on the court rolls would appear upon the very face of it to have been made absolutely.

Covenants and powers of sale usually contained in a separate instrument.—The mortgage covenants, as also the powers or trusts for sale (if any), and any other matters connected with the mortgage, should be contained in a separate deed; for the court rolls ought not to be incumbered with entries of this nature: (see the form of a covenant of this kind 2 Con. Prec., Part II., Section IV., No. II., p. 197, 2nd edit.)

Mortgagee often satisfied to rely upon a covenant to surrender.—But it often happens that a mortgagee is satisfied to rely upon a mortgagor's simple covenant to surrender, although it is open to the objection that, as such covenant is capable only of passing an equitable interest, the estate is not bound at law, so that, if the mortgagor was afterwards to make a surrender to the use of a subsequent purchaser or mortgagee for valuable consideration who had no notice of such prior incumbrance, the latter would be entitled to a priority on the ground of having both law and equity on his side: (*Oxwick v. Plumer*, 5 Bac. Abr. edit. Gwill. 43.) Its advantages are, that it saves some expenses to the mortgagor; as, upon the paying off the mortgage, evidence of such payment and redelivery of the mortgage deed will be sufficient to discharge the equitable claim upon the property, which was all that the assurance embraced; whereas, if a surrender had been actually made, and the mortgagee duly admitted thereupon, there must have been a resurrender, and a readmittance of the mortgagor, who must of course have borne the whole of these expenses.

Admission generally delayed upon surrender to mortgagee's use.—But even where a surrender has been duly made, the mortgagor's admission is usually delayed with a view of saving expense, which a mortgagee may safely permit, as his security will not be prejudiced by a delay in obtaining admission, where a presentment has been duly made, any further than that, until he does actually get admitted, he has no legal title, and consequently is unable to maintain ejectment or the recovery of the mortgaged premises. But, although admission may be delayed without endangering the mortgagee's interest, the presentment of the surrender should be made immediately, lest it should be avoided by delay, and thus a new presentment become necessary: (*Fawcett v.*

Lowther, 2 Ves. 300.) But if the presentment be made in due time, both the lord and steward are fixed with notice of the transaction, and mesne and subsequent incumbrancers are thus deprived of their preference; for the admission on a duly presented surrender will relate back to the time when such surrender was made, and thus avoid all intermediate dispositions to the prejudice of the first surrenderee. And although an unadmitted mortgagee upon a conditional surrender is incapable of maintaining ejectment, he may nevertheless exercise a power of sale conferred upon him by the mortgage deed; nor will a fresh surrender be necessary in a case of this kind, as the purchaser, upon the power being exercised, will be in under the original surrender: (*Beal v. Shephard*, Cro. Jac. 199; *Rex v. Lord of the Manor of Oundle*, 1 Ad. & Ell. 283.) It appears, however, that in some manors a special custom prevails, by which the lord may compel the admission of the mortgagee, immediately after the condition is broken, for the purpose of exacting the fine.

How deed of covenant to accompany surrender should be penned.—The deed of covenant to accompany a surrender, after setting out the date and description of the parties, recites the agreement for loan, and also the conditional surrender and agreement that the mortgagor should enter into the covenants thereafter mentioned; the mortgagor then covenants to pay principal and interest, and all outgoings in respect of the mortgaged premises, with power of sale in default, followed by absolute covenants that he has good right to surrender; for quiet enjoyment and freedom from incumbrances, and for further assurance; and the mortgagee enters into the usual qualified covenants that mortgagor shall enjoy until default, and that mortgagee will not exercise power of sale without giving mortgagor due notice thereof: (see the form 2 Con. Prec., Part V., Section IV., No. II., pp. 197, 200, 2nd edit.)

How deed of defeasance should be penned where mortgagee has been actually admitted tenant.—If the mortgagee has been actually admitted tenant to the mortgaged premises, the deed of defeasance, after describing the parties, should recite the surrender by the mortgagor to the mortgagee's use, and the admission of the latter to the mortgaged premises, and that such surrender was made by way of mortgage security. It must also be declared that the said surrender shall enure to the mortgagee's use, subject to redemption

upon payment of principal interest and costs, with power of sale in default of payment, and the other usual mortgage covenants, in the same way as where the mortgage is by way of conditional surrender only: (see the form 2 Con. Prec., Part V., Section IV., No. V., pp. 210, 211, 2nd edit.).

Where the mortgage is by way of covenant only.—Where the mortgage rests upon a simple covenant from the mortgagor to surrender, the previous surrender to the mortgagor's use, and his admission to the copyhold premises, is first recited; and then the agreement for the loan. The mortgagor next covenants to surrender to the mortgagee's use, and that in the meantime, until such surrender shall be perfected, the mortgagor will stand possessed of the mortgaged premises in trust for the mortgagee his heirs and assigns. Then follows a proviso for redemption; powers of sale in default of payment; with the same mortgage covenants as upon a mortgage where a conditional surrender has been actually made: (see the form 2 Con. Prec., Part V., Section IV., No. III., pp. 201, 206, 2nd edit.).

Where conditional surrender is accompanied by a bond.—Where a bond is added by way of collateral security to a conditional surrender of copyholds, the instrument, after the usual exordium (in which the mortgagor binds himself in a penalty in double the amount of the money advanced upon the mortgage), recites the surrender to the mortgagee's use, and that the bond itself is to be given by way of collateral security, with a condition for avoiding the bond in case the mortgagor shall pay the principal and interest at the appointed time, and if he had good right to surrender; and if, in case of default, the mortgagee, after being duly admitted tenant, shall peaceably enjoy the mortgaged premises free from incumbrances, and the mortgagor shall execute such further assurances as the mortgagee shall require: (see the form 2 Con. Prec., Part V., Section IV., No. IV., p. 207, 2nd edit.) The covenant that the mortgagor shall enjoy until default must be left out, as it will be out of place in any part of the bond, but it may be inserted in the conditional surrender, unless the steward, as he may if he pleases, should refuse to permit this insertion; in which case the covenant must then rest on a tacit understanding of the parties, which will raise a species of tenancy at will, or by a declaration of trust, which in equity will be binding on all parties.

Where the mortgage is of an equity of redemption.—If the mortgage is of an equity of redemption of copyholds, the proper mode of assurance is by deed of release of the mortgagor's equitable estate in the premises; for a mortgage of an interest of this nature in copyholds will pass by deed without any surrender: (*Rez v. Lord of the Manor of Hendon*, 2 T. R. 484.) The mortgage deed must also contain a covenant from the mortgagor that he will stand possessed of the mortgaged premises, subject to the pre-existing mortgage, in trust for the second mortgagee; and that, in case the first mortgage is redeemed, the mortgagor will surrender the mortgaged premises to the second mortgagee's use: (see the form 2 Con. Prec., Part V., Section V., No. IX., p. 226, 2nd edit.)

CHAPTER V.

MORTGAGES OF STOCK IN THE FUNDS; OR TO SECURE LOANS OF STOCK; OF SHARES IN OR BY PUBLIC COMPANIES; OF POLICIES OF ASSURANCE UPON LIVES; UPON DEBTS, AND PERSONAL SECURITIES, JUDGMENTS, LEGACIES, INTERESTS IN SHIPPING; OF HOUSEHOLD FURNITURE AND OTHER MOVEABLE EFFECTS; AND ALSO OF MIXED KINDS OF PROPERTY, BONDS AND WARRANTS OF ATTORNEY.

I. MORTGAGES OF STOCK IN THE PUBLIC FUNDS, OR TO SECURE LOANS OF STOCK.

1. Mortgages of stock.
2. Where a loan of stock is secured by a mortgage of real estate.
3. Where a loan of stock is secured by bond.

II. MORTGAGES OF SHARES IN OR BY PUBLIC COMPANIES.

1. Mortgages of shares in public companies.
2. Mortgages of shares by public companies.

III. MORTGAGES OF POLICIES OF ASSURANCE UPON LIVES; OF DEBTS, BILLS OF EXCHANGE, PROMISSORY NOTES, AND OTHER PERSONAL SECURITIES, JUDGMENTS, AND LEGACIES.

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VII. BONDS AND WARRANTS OF ATTORNEY FOR SECURING THE PAYMENT OF A DEFINITE AND CERTAIN SUM OF MONEY.

1. Bonds.
2. Warrants of attorney.
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I. MORTGAGES OF STOCK IN THE PUBLIC FUNDS, OR TO SECURE LOANS OF STOCK.

1. Mortgages of stock.
2. Where a loan of stock is secured by a mortgage of real estate.
3. Where a loan of stock is secured by bond.

1. *Mortgages of Stock.*

Stock not often made the subject-matter of a mortgage security.—Stock in the public funds is not often resorted to as a mortgage security, as the fundholder has usually the means of raising the money at less trouble and expense by selling out a sufficient amount of stock to raise the required sum. Where mortgages of property of this kind most frequently occur, is where the party requiring to raise the money has only a life estate, or some other limited or contingent interest, in the stock. Still, where the funds happen to be in a very depressed state, or the stock itself is shut, and so incapable of being sold out, and there is some pressing exigency for the money, it may be advantageous to resort to a mortgage of the stock, the incidental expenses of which are far less heavy than in a mortgage of real estate, where lengthy abstracts of title have often to be prepared and a long title investigated and perfected and a vast deal of business to be gotten through before the mortgage assurance can be completed.

Mortgages of stock, how usually effected.—Where the mortgagor has an absolute interest and power of disposition over the stock, a mortgage of it is usually effected by a transfer of such stock into the name or names of one or more trustee or trustees, *upon trust* to re-transfer upon payment of principal and interest, with a proviso that the mortgagor shall be permitted to receive the dividends until default.

Transfer of the stock, how to be made.—The transfer may be made by the mortgagor either in person, or by means of a power of attorney given by him for that purpose. The transfer usually precedes the execution of the mortgage deed, the latter of which, after reciting the transfer, declares that the trustees or trustee into whose names the transfer has been made, shall stand possessed of the stock upon trust to re-transfer into the mortgagor's name upon payment of principal and interest, but upon trust to sell in default of such payment. The mortgagor then enters into general

covenants, that he has good right to transfer, and that the stock so transferred shall be held upon the trusts therein declared, free from incumbrances, and for further assurance; with qualified covenants from the mortgagees that mortgagor shall receive the dividends until default; and that the trusts for sale shall not be carried into effect without giving him due notice, concluding with a power to change trustees: (see the form 2 Con. Prec., Part V., Section V., No. I., pp. 232, 237, 2nd edit.)

Mortgagee of stock has a power of sale, without any express words to that effect.—Although it is the usual practice to insert a power of sale in mortgages of stock, still this is not essential; because a mortgagee of stock, who takes a transfer from the absolute owner, may at any time after default in payment of the mortgage debt and interest sell out the stock for the purpose of discharging the mortgage, without either a trust or power to that effect being expressed in the mortgage deed: (*Tucker v. Wilson*, 1 P. Wms. 261; *Lockwood v. Ewer*, 2 Atk. 303.

As to mortgages of life interests in stock.—Life interests in stock standing alone afford a very poor mortgage security, and may possibly become worthless by the mortgagor's death before any dividends become payable, in which case the mortgagee would get nothing whatever from the stock. Assurances of this kind are therefore almost invariably accompanied by the assignment of a policy of assurance upon the borrower's life, and when this is the case, a mortgagee of a life interest in stock stands in as good, if not a better plight, as far as receiving his interest is concerned, than any other mortgagee of a life interest, as the time and amount of the payment of the dividends is certain and unchangeable, however fluctuating the value of the principal may be, on account of the rise or fall in the price of the stock.

How mortgage of a life interest in stock should be prepared.—The mortgage deed of a life interest in stock should recite the settlement, will, or other instrument under which the mortgagor acquires his estate and interest in the stock; the fact of the policy of assurance having been effected upon his life previously to the mortgage should be recited, followed by the recital of the agreement and terms of the loan. The mortgagor must then assign his interest in the stock, and also the policy of assurance, to the mortgagee, subject to a

proviso for redemption on payment of principal and interest, which the mortgagor enters into a general covenant to pay; as also that he has a right to assign; for quiet enjoyment, freedom from incumbrances, and for further assurance, and a further covenant to keep up the policy, with power for mortgagee to renew in default. The mortgagee usually enters into qualified covenants that mortgagor shall receive the dividends until default: (see the form 2 Con. Prec., Part V., Section V., No. II., pp. 238, 242, 2nd edit.)

2. *Where a Loan of Stock is secured by a Mortgage of Real Estate.*

Loan of stock sometimes secured by mortgage of real estate.]—A loan of stock is sometimes made upon the mortgage security of real estate, in which case the usual practice is for the proviso for redemption to be upon the condition that the mortgagor will, on some specified day, transfer the same amount of stock into the mortgagee's name, and also to pay a sum equivalent to the dividends accrued during the interim; with a covenant from the mortgagor to make such transfer and payment accordingly: (see the form of mortgage of this kind, 2 Hughes Pract. Mort., Prec. K., No. V., p. 72.)

Mortgagee's remedies in case of mortgagor's default.]—In case the mortgagor makes default in transferring the stock at the appointed time, the mortgagee may proceed against him at law for the recovery of the value of the stock, in which action he will be entitled to recover the value of the stock at the time of the transfer, although the price of the stock may be much lower at the time of the trial: (*Sanders v. Kentish*, 8 T. R. 162.) And it has been held, that in estimating the amount of damages in an action at law for breach of an engagement to replace stock on a given day, it is not enough to take the value of the stock on that day, if it has risen in value in the meantime, but the highest value that it stood at at the time of the trial, there being no offer of the defendant to replace it in the intermediate time when the market was rising: (*Shepherd v. Johnson*, 2 East, 211; *Payne v. Burke*, 2 East, 213.) But it has also been held, that in an action upon a bond for not replacing stock, the obligee is not entitled to special damage for what he might have made if it had been sooner replaced, unless he shows that he demanded payment for that express purpose: (*McArthur v. Leaforth*, 12 Taunt. 257.) And in a still

more modern case (*Harrison v. Harrison*, 1 Car. & Pay, 412), the rule adopted on a writ of inquiry upon a bond to replace stock was to take the price at the day of trial, or the preceding day, and not at the option of the plaintiff at that day, or the day on which it ought to have been replaced: (see also *Downes v. Back*, 1 Stark. N. P. C. 318.)

Remedies in equity.]—In equity, it seems to have been considered that the lender of the stock is entitled to the value of it at the time of transfer, with interest at five per cent. from the time of the Master's report; upon the principle that the fair measure of the damage sustained by the breach of the condition for not transferring the stock at the time appointed, in consequence of which the penalty of the bond became forfeited at law; and also on the habit of the court as to compensation where a trustee improperly sells out, in which case the *cestui que trust* has an opportunity either to have the stock, or the money produced by it, with interest: (*Forrest v. Elwes*, 4 Ves. 497.)

Practical suggestions.]—To prevent any questions from arising upon this subject, it has been a common practice in loans of this kind to give the lender the option of taking the amount of the price of the stock at the time of the loan, or at the time appointed in the proviso for redemption for discharging the mortgage debt.

How proviso should be framed.]—The best way of preparing a proviso of this kind, is to provide that in case the borrower or his representatives shall, on a certain day therein appointed, if the request thereafter mentioned be not made within one week thereof, pay unto the lender the amount (specifying the sum) of the price of the stock at the time of the loan, or shall, on such day as aforesaid, at the request of the lender, and costs of the borrower, purchase or transfer into the lender's name the same amount of stock as was originally borrowed of him, with interest at the rate reserved on the amount of the original price of the stock, then the lender will reconvey the mortgaged premises, &c. To this proviso should be added a covenant from the borrower to make such payment or transfer as the lender in his option may appoint; with powers of sale in default, followed by the other usual mortgage covenants as in other ordinary mortgage assurances.

3. *Where a Loan of Stock is secured by Bond.*

How security should be penned where the repayment of stock is to be secured by bond.]—The repayment or re-transfer of a loan of stock is sometimes secured by bond. When this security is given, the obligor binds himself in the usual manner in a penalty of double the value of the stock. The instrument then proceeds to recite the loan of the stock, and if the bond is given as a collateral security to a mortgage of other property, such mortgage should also be recited. A condition is then inserted for avoiding the bond in case the obligor shall, on some specified day, transfer the same amount of stock into the name of the obligee, and in the meantime pay him such sums of money as shall be equivalent to the dividends which would have become payable in respect of such stock: (see the form 2 Hughes Pract. Mort., Prec. K., No. VI., p. 75.)

II. MORTGAGES OF SHARES IN OR BY PUBLIC COMPANIES.

1. Mortgages of shares in public companies.
2. Mortgages of shares by public companies

1. *Mortgages of Shares in Public Companies.*

Mortgages of railway shares, shares in canals, bridges, &c., how effected.]—Assignments of railway shares, as also of shares in canals and bridges, and of other companies established under acts of Parliament, are regulated by the respective acts by which such companies are incorporated, a form of which is usually contained in some schedule annexed to the acts. But those forms seem applicable only to absolute sales; consequently, where any such shares are to be assigned by way of mortgage, a deed of defeasance will become necessary. In addition to this, a transfer must be registered in the books of the company, which the mortgagee should lose no time in doing, particularly if the mortgagor is a person amenable to the bankrupt laws, in order to protect the security against any future claims that might be set up by the assignees of the shareholder in case of his becoming bankrupt (*Boadley v. Holdsworth*, 3 Mees. & Wels. 442; *Ex parte Lancaster Canal Company*, 1 Dea. & Ch. 411), as the name of the mortgagor, so long as it is permitted to remain on the books of the company, will afford sufficient evidence of reputed ownership to let in the claim of the assignees, which is always allowed in cases of this nature, unless the best transmutation

of reputed ownership is made that the circumstances of the case will admit of: (see stat. 21 Jac. 1, c. 19, s. 28; 6 Geo. 4, c. 16, s. 72; *Longman v. Tripp*, 2 N. R. 67.) It may be proper, however, to observe, that the clauses in the Bankruptcy Acts which relate to such visible ownership are only applicable to such shares (but which railway shares almost invariably are) as are of the nature of personal property, and do not affect such shares as are declared *by the act creating them* to be in the nature of real estate; for interests of the latter kind do not fall within the denomination of "goods and chattels," to which the clauses above alluded to are alone applicable: (*Ex parte Vauxhall Bridge Company*, 1 Glyn & J. 101.) Still, unless the act of incorporation expressly declares that the shares are to be considered as real estate, the mere circumstance of the company possessing land will be insufficient to vary the nature of the shareholder's interests, which will be considered as coming under the denomination of "goods and chattels" within the meaning of the Bankrupt Acts: (*Ex parte Valence, re Lashmeer*, Dea. 254.)

Practical directions for conducting the mortgage of railway shares.—To effect a mortgage of railway shares, or any shares in incorporated companies under acts of Parliament, the mortgagor ought to transfer the shares according to the form adapted to that purpose by the act, and register the transfer in the books of the company, which must be done by delivering the deed of transfer to the secretary of the company, who will then enter a memorial thereof in a book called the "Register of Transfers," and such entry is to be indorsed on the transfer, and such secretary is also, on demand, to deliver a new certificate to the transferee.

How deed of defeasance to accompany transfer must be penned.—The defeasance must, as we have just before noticed, be made by a separate instrument. It must recite that the mortgagor is entitled to the shares under the act of Parliament by which the company was incorporated, and that the mortgagor has transferred the shares to the mortgagee, which transfer has been duly registered according to the provisions of the act; and it should then be declared that the mortgagee is to stand possessed of the assigned shares, upon trust for securing to him the payment of his mortgage debt and interest, with power of sale in default of payment. The mortgagor then enters into general covenants for pay-

ment of principal and interest; to indemnify the mortgagee against calls in respect of the transferred shares; and to pay all moneys advanced by the mortgagee on account of such shares: (see the form 2 Con. Prec., Part V., Section VI., No. II., pp. 256, 259, 2nd edit.) The last-mentioned clause is a very important one, as the mortgagee, upon registering his transfer of the shares, will become responsible for calls accruing upon them: (stat. 8 Vict. c. 16, s. 15; *Burnett v. Lynch*, 5 B. & C. 589.)

On what instrument the stamp must be impressed.—In all mortgages of railway shares, or of shares in bridges or canals, the *ad valorem* stamp must be impressed upon the deed of defeasance, and not upon the deed or other instrument by which the shares themselves are transferred.

2. Mortgages of Shares by Public Companies.

Public companies, how authorized to borrow money.—Public companies are, under the acts of Parliament by which they are incorporated, generally, if not invariably, empowered to borrow money for the purpose of carrying on the undertaking. Thus, trustees under the numerous Turnpike Acts, now repealed by the General Act, 3 & 4 Geo. 4, c. 126, by which all mortgages of the tolls are now governed, and railway companies, by their respective acts of incorporation are empowered to borrow money, in the first-mentioned instance upon the security of the tolls, and in the second, upon the success of the undertaking. In either case, the form of security is pointed out by the several acts of Parliament by which such tolls are legalized, or such companies are incorporated.

As to mortgages of turnpike tolls.—With respect to turnpike tolls, the 81st section of the act 3 & 4 Geo. 4, c. 126, empowers trustees of turnpike roads to borrow such sums of money as they may think proper on the credit of the tolls, and to demise and mortgage such tolls, as also the turnpike gates and toll-houses for collecting the same (the costs of which are directed to be paid out of the tolls), as a security to any persons who shall advance such money, the form of which mortgage is annexed to the act: (see the form 1 Hughes Pract. Mort. 324.)

Copies of mortgages of tolls to be entered in a book kept for that purpose.—Copies of such mortgages are directed to

be entered in a book kept for that purpose by the clerk or treasurer to the trustees or commissioners, who is entitled to the sum of 5s., and no more, for such entry, out of the tolls; which book may be inspected at all times without fee or reward.

As to the assignment of mortgages of turnpike tolls.—Mortgagees of turnpike tolls are also further empowered to assign their mortgages, the form of which is also prescribed by the statute to be indorsed on such mortgage security, or to be underwritten or thereto annexed, and signed in the presence of and attested by one or more credible witness or witnesses: (see the form 1 Hughes Pract. Mort. 325.)

Transfer to be notified to clerk or treasurer within two calendar months after date.—This transfer is to be produced and notified to the clerk or treasurer of the trustees within two calendar months after the date thereof, who must enter the same in the said book, for which he is to be entitled to the sum of 5s., and no more, and such transfer shall entitle the assignee to the full benefit of such mortgage security; and every such assignee is authorized to assign the same, and so *toties quoties*, and it will not be in the power of any person (except the persons to whom the same shall be last transferred, or his or their respective executors or administrators) to release the original mortgage security; and all persons to whom such mortgage shall be made, will, in proportion to the moneys thereby secured, be creditors on the tolls, &c. by such acts granted in equal degree one with another, in such order as shall be agreed upon and stipulated by the said trustees and commissioners at the time of the advance of their respective shares.

As to mortgages by railway companies.—Railway companies, subject to the restrictions of the special act (8 Vict. c. 160, s. 38), and by an order of a general meeting, are empowered to borrow money by mortgage or by bond upon the security of the undertaking, and the future calls of the shareholders; and also to re-borrow, if any mortgage or bond shall be paid off. These mortgages or bonds must be made by deed, and be also stamped with the same stamps as are required in ordinary mortgage transactions, the forms of which, as we have already noticed, are prescribed by the act, and must be made under the common seal of the company: (see the form 2 Con. Prec., Part V., Section VI.,

No. III., p. 260, 2nd edit.; see also stat. 8 Vict. c. 16, schedule D.)

Of the estates and interests which the several mortgagees take in railway property.—Under mortgages of this description, the several mortgagees are entitled one with another to their respective proportions of the tolls, sums and premises comprised in such mortgages, and to the future calls of the shareholders, according to the respective sums advanced, and to be repaid the same with interest, without any preference on account of the priority of the date of any such mortgages: (stat. 8 Vict. c. 16, s. 42.)

Mortgages and bonds required to be registered.—All these bonds and mortgages are required to be registered in a book to be kept for that purpose by the secretary, to be open for the perusal of the shareholders, mortgagees, and bondholders, at all reasonable times: (sect. 47.)

How mortgages of railway companies are to be transferred.—These mortgages and bond debts may be transferred by a deed, the form of which is also attached to the above-mentioned act (8 Vict. c. 16, sched. E.); which deed must be duly stamped, and the conditions duly stated; and any transfer of such mortgages must be registered with the secretary, in the same manner as in the case of the original mortgage: (sect. 47.)

How interest on the mortgage of railway shares is to be reserved.—The interest on such mortgage or bond is to be paid at the periods appointed in such mortgage or bond, and if no period be appointed, then it is payable half-yearly, and in preference to any dividends payable to any shareholders of the company (sect. 48), but such interest will not be transferable unless by deed duly stamped.

Company are empowered to fix period for repayment of money.—The company may, if they think proper, fix a period in the mortgage or bond for the repayment of the money; at the expiration of which period, the mortgagee or obligee will be entitled on demand to the repayment of his principal, and all arrears of interest accrued due thereon; and if no place of payment is inserted in such mortgage or bond, such principal and interest shall be payable at the principal office or place of business of the company: (sect. 50.)

But where no time of payment is fixed, either party may give the other six months' notice.

How and in what manner notice must be given.—The notice must be what is termed a written notice, that is, a notice either in writing or in print, or by both, and if given by a mortgagee or bond creditor, must be delivered to the secretary, or left with the principal officer of the company. If such notice is given by the company, it must be served either personally on the mortgagee or bond creditor, or left at his residence, and if such mortgagee or bond creditor be unknown to the directors, or cannot after diligent inquiry be found, such notice shall be given by advertisement in the *London and Dublin Gazette*, according as the principal office shall be in England or Ireland, and in some newspaper as after mentioned: (sect. 51.) And after the expiration of such notice, all future interest shall cease: (see *Hodges on Railways*, 138.)

III. MORTGAGES OF POLICIES OF ASSURANCE UPON LIVES; DEBTS, BILLS OF EXCHANGE, PROMISSORY NOTES, AND OTHER PERSONAL SECURITIES, JUDGMENTS, AND LEGACIES.

Policies of assurance on lives, when resorted to as a mortgage security.—Policies of assurance upon lives standing alone afford very inadequate mortgage securities; still, persons in the receipt of large incomes derived from the profits of offices, or other appointments, who are desirous of raising a sum of money for some particular object, often find parties willing to make them the required advance upon having a policy of assurance upon the borrower's life to the amount of the sum to be secured, accompanied by a deed of covenant for the repayment of principal and interest, and to keep up the policy of assurance, with power for the lender to renew the same in case of the borrower's default in so doing.

Mortgages of policies of assurance liable to stamp duty.—It may not, perhaps, be improper to remark here, that the *ad valorem* duty upon mortgages will attach upon the mortgage of a policy of assurance in like manner as upon mortgages of any other kind of property; and these observations are, perhaps, more particularly called for, because, until very recently, an almost universal opinion appears to have prevailed amongst the profession that no *ad valorem* duty whatever was chargeable upon an assignment of a policy of assurance by way of mortgage security; but in a case not

very long since decided in the Court of Exchequer, it was held that a policy of assurance was a valuable article, and capable of being mortgaged, and that therefore an assignment made for that purpose will require an *ad valorem* stamp: (*Colwell v. Dawson*, 14 L. T. Rep. 468.)

When policies of assurance are most frequently adopted as a mortgage security.]—Where a life policy of assurance is most frequently taken as a mortgage security, is where trustees under the provisions of a marriage settlement are authorized to make certain advances out of the trust moneys to the husband, upon the latter effecting a policy of assurance upon his life, and assigning the same to the trustees as a security for the repayment. An instrument of this nature recites the marriage settlement authorizing the trustees to make the advance to the husband upon the above-mentioned terms, and that the latter, requiring the loan, has effected the assurance upon his life to the amount of the sum to be advanced him, in consideration of which advance the husband assigns the policy to the trustees, with usual power to receive and give discharges for all moneys to be received by virtue thereof, followed by general covenants from the husband that he has good right to assign; for quiet enjoyment, and for further assurance; that he will keep up policy of assurance, with power for trustees to renew in default; that he will attend at assurance office whenever thereunto required by the trustees, and will do no act to endanger the policy; concluding with a declaration that the mortgage moneys, on the decease of either of the trustees, shall be transmissible to the survivor: (see the form 2 Con. Prec., Part V., Section V., No. IV., pp. 263, 264, 2nd edit.)

Bond debts.]—Bond debts are not often made the subject-matter of a mortgage security, because, if the obligor's circumstances are such as to render his bond an available security to a third party, the obligee of such bond requiring his money can resort to his legal remedy upon the bond itself. Still, it sometimes happens that a bond creditor is in immediate want of a sum of money when the bond is only security for a payment to be made at some future and perhaps distant period; or the sum which the obligee requires may be so small in proportion to the amount of the bond debt, that he may be unwilling to call it in; in either of which cases a mortgage may be found convenient, provided the borrower can discover any one willing to make an advance upon such a security.

How mortgage of a bond debt should be penned.—Where a mortgage is of a bond debt, the assurance should recite the bond, and that the mortgagee has agreed to make the advance upon its security. The mortgagor must then assign the bond to the mortgagee, with power of attorney to sue upon and give effectual releases. A proviso for redemption is next inserted, to which is sometimes added a power of sale in default, although, generally speaking, the mortgagee is satisfied to rely upon his remedy to sue upon the bond. The mortgagor enters into general covenants that the bond is a valid and subsisting security; that he will not revoke the power of attorney, or release any action brought by the mortgagee in his name. A proviso is next inserted that the mortgagee shall not be compelled to sue upon the bond, to prevent any question from arising as to his liability for not taking effectual steps to enforce the payment of the money secured by the bond, which may be afterwards lost by the bankruptcy or insolvency of the obligor; and concluding with a covenant from the mortgagee not to exercise the power of sale without giving the mortgagor due notice thereof: (see the form 2 Con. Prec., Part V., Section VI., No. V., pp. 265, 268, 2nd edit.)

Promissory notes and bills of exchange.—Promissory notes and bills of exchange are not often made the subject-matter of a formal mortgage security, although it is a daily practice to deposit them by way of equitable mortgage, in the same manner as the title deeds of landed property; still they may be, and sometimes are, actually assigned as a mortgage security; as, for example, where the bills have a long time to run, and the holder has immediate occasion for money.

How mortgages upon bills of exchange and promissory notes should be penned.—The form of a mortgage upon the security of bills of exchange or promissory notes should recite the date of the bills or notes, the name of the debtor or acceptor, the sum thereby secured, and the time the bill or note has got to run, followed by a recital of the agreement for loan; the mortgagor then assigns the bills or promissory notes, accompanied by a power of attorney to sue for the moneys thereby secured, and gives receipts for the same, with a proviso for redemption upon payment of mortgage debt and interest at the appointed time. A power of sale may be inserted, although the power of attorney to sue upon the bills, unless they are of an unusually long date, often gives an adequate security without it. The usual covenants

are, for payment of principal moneys and interest; that the debt for which they are given as a security is an actual, valid, and subsisting debt; and that the mortgagor will not revoke the power of attorney, or release the debt, or any action brought for its recovery; and for further assurance; concluding with a proviso that the mortgagee shall not incur any liability for neglecting to sue upon the bills or notes: (see the form 2 Con. Prec., Part V., Section VI., No. VI., pp. 269, 270, 2nd edit.)

Simple contract debts.—Where simple contract debts are assigned as a mortgage security, the best course is to have the amount of the debts, the names of the debtors, and the particulars for which they were contracted, set out in a schedule annexed to the mortgage deed. This deed should recite that the debts are so particularised and set out, and that the mortgagor has agreed to assign them as a security for the moneys advanced to him. He should then assign the debts, with a power of attorney to sue for and give sufficient discharges for the same, to which should also be added a power to compound debts, give time for payment and take securities for such payment, so as effectually to exonerate the mortgagee from any personal responsibility he might otherwise incur by so doing. To this should also be added a declaration of trust that the mortgagee shall stand possessed of all the credits he shall so recover and get in, first, upon trust to defray his incidental expenses thereby incurred, next, to retain the principal moneys and interest due to him upon his mortgage security, and then to pay over the surplus moneys (if any) to the mortgagor, or his personal representatives. A proviso for redemption on payment of principal and interest should be inserted. The usual covenants are, that the mortgagor will pay principal moneys and interest on some specified day; that the debts assigned are actually due to him; that mortgagor will not revoke the power of attorney, nor release any of the debts; and for further assurance; concluding with a proviso exonerating the mortgagee from any liability for neglecting to sue for any of the assigned debts: (see the form 2 Con. Prec., Part V., Section VI., No. VII., pp. 273, 275, 2nd edit.)

Judgment debts.—In the mortgage of a judgment debt, the judgment itself should be recited, and if such judgment has been entered up upon a warrant of attorney, that fact ought also to be stated. The judgment debt should then be assigned, with the usual power of attorney to sue for and

give effectual discharges for the same. In framing this clause, care must be taken to extend the power to appointing a substitute or substitutes, otherwise the assignee of a mortgagee would be unable to sue upon it; for the deed alone passes a mere chose in action, which at law is not assignable, and therefore execution upon this can only be obtained from the original assignor, who is alone, in the eye of the law, the attorney for the original creditor. In Ireland, the assignee of a judgment, *in the case of judgments confessed*, but not otherwise, is enabled to sue in his own name, so that in a case so situated, provided it be in that country, it will not be necessary even to insert a power of attorney from the assignor to authorize the assignee to sue for the debt in his own name: (*O'Callaghan v. Marchioness of Thomond*, 3 Taunt. 82.) Still, in Ireland, as well as in England, it will ever be the most prudent course to insert a power of attorney authorizing the mortgagee not only to sue, but also to appoint an attorney or substitutes for that purpose: (see the form of a mortgage of a judgment debt, 2 Con. Prec., Part V., Section VI., No. VIII., pp. 276, 277, 2nd edit.)

Mortgages of legacies.—The payment of legacies being oftentimes postponed in consequence of the difficulty of getting in the assets, and a variety of other causes, a legatee is often compelled in the interim to resort to the security of his legacy to raise a fund for some immediate purpose.

Precautions to be taken by mortgagee's solicitor before he recommends an advance upon a legacy.—Before a solicitor advises his client to advance money upon a security of a legacy, he must satisfy himself, not only that the bequest is a valid one, and the amount sufficient to afford an adequate security, but also that the executor has assented to such bequest; for until such assent be given, the legatee has only an inchoate and imperfect title; added to which, the testator's assets may be altogether inadequate to meet the amount he has bequeathed, which can never be determined until the executor has ascertained the extent and value of the assets, and assented to the bequest; but when such assent is given, then the title of the legatee is made complete; the legal estate of the executor in the fund ceases, and the entire property, legal and equitable, becomes vested in the legatee; after which, if the executor should waste the assets, the persons affected by it cannot come upon the legatee for redress, their only remedy in such case being against the

executor personally: (Brigd. 55; Roper on Leg. 844; *Foster v. Spencer*, cited in *Saunders's case*, 5 Rep. 12 b.

Assent equally necessary in bequests of stock.—An erroneous opinion seems at one time to have prevailed, that as the several acts of Parliament which regulate the devising of property transferable at the Bank (by which the probates of wills are directed to be therein deposited for the purpose of having the trusts extracted), that where stock has been specifically bequeathed, without the intervention of trustees, to permit the transfer to be made to the legatees and not to the executor, the assent of the executor to the bequest was thereby rendered unnecessary; but this doctrine is clearly wrong; the executor has a legal right to the specific, as well as to the general assets, to pay debts, &c., and has, if he pleases, the sole right to call upon the Bank to transfer the stock into his name, so that his assent is as essential in the case of a bequest of stock as of any other personal property, and in neither case will any legal interest vest in the legatee until such assent be given. It is also perfectly immaterial whether such property be given *specifically* in the strict sense of the word, or as a *residue*; such property being considered in no other view than the other general assets as to this purpose, and therefore subject to all the incidents of a testamentary disposition of personal estate: (1 Rop. on Leg. 483, 4th edit.; *Bank of England v. Moffat*, 3 Bro. C. C. 262; *Franklin v. Bank of England*, 1 Russ. 575; S. C., 9 B. & C. 156.)

How the mortgage of a legacy should be framed.—In a mortgage deed of property of this nature, it will be proper to recite the will by which the legacy is bequeathed, the death of the testator, and the probate of his will. The legacy should be then assigned to the mortgagee, but as it is incapable of being sued for in a court of law, it would be useless to insert a power of attorney purporting to confer this authority upon him; but where the subject-matter of the legacy arises out of a fund in the Court of Chancery, then the legatee may grant a power of attorney to the mortgagee authorizing the latter, in the mortgagor's name, to authorize any barrister to appear for him in the suit in the said Court of Chancery, and then and there to consent to any motion or petition that shall be presented by the mortgagee for the purpose of preventing the payment and transfer and the assigned moneys to any person except himself, without due notice thereof, or for the purpose of obtaining

the payment and transfer of such moneys. To this should be added a power to appoint substitutes, as in other ordinary powers of attorney: (see the form 2 Con. Prec., Part V., Section VI., No. IX., clause A., *in notis*, p. 279, 2nd edit.)

This clause should be preceded by a recital, which ought to be inserted in the clause preceding that of the agreement for the loan, wherein the order of the Court of Chancery directing that the trusts of the will should be carried into execution should be stated, and the subsequent proceedings, if any, that have taken place thereon: (see a form of this kind, 1 Con. Prec., Part II., Section I., No. XXXVII., clause 3, p. 202, 2nd edit.)

IV. MORTGAGES OF INTERESTS IN SHIPPING.

Mortgages of interests in shipping, how now regulated.—Mortgages of interests or shares in shipping are now regulated by the new Merchant Shipping Act (17 & 18 Vict. c. 104), by which a registered ship, or any share therein, may be transferred by way of mortgage security by an instrument in the Form I. in the schedule annexed to the act, or as near thereto as circumstances will permit: (sect. 76.)

As to form of mortgage.—The form of mortgage is headed by a table which sets out the name and description of the ship; whether she be British or foreign built; her port of registry; and how she is propelled, as, whether by steam or sails; and if by steam, whether by paddle or by screw. Underneath the above particulars is added a very short form of mortgage, by which the mortgagor, in consideration of the money advanced to him, enters into general covenants with the mortgagee for payment of principal and interest, and that if such moneys are not paid at the appointed time, the mortgagor will, during such time as the same shall remain unpaid, pay interest for so much of the principal moneys as shall remain undischarged at some specified rate therein mentioned, by equal half-yearly payments, on some particular days therein specified; and that for better securing the repayment of such principal moneys and interest, the mortgagor thereby mortgages to the mortgagee the shares of which he is the owner of and in the ship above described; concluding with a further covenant from the mortgagor that he has power to mortgage his above-mentioned shares in the ship, and that the same are free from incumbrances. No powers of sale are contained in this form, which in fact are

unnecessary, as absolute powers of sale are conferred upon the mortgagee by the express words of the act: (sect. 71.)

How mortgage should be framed where there are any registered incumbrances.—If there are any registered incumbrances (and unless incumbrances are registered, a mortgagee will not be affected by them), the latter covenant must be qualified by adding at the end, “*save as appears by the registry of the said ship.*”

Form may be altered according to circumstances.—With a slight alteration in the language of the above form, to meet the particular circumstances of the case, it may be adapted so as to secure a general balance of accounts, or otherwise, as occasion may require.

How executed.—The instrument must be signed, sealed, and delivered in the presence of one or more witness or witnesses, and when so executed and attested it must be taken to the registrar of the port at which the ship is registered, who will enter the same in the register book (sect. 66) in the order of time in which the same is produced to him for that purpose, and at the same time, by memorandum under his hand, notify on the instrument of mortgage that the same has been recorded by him, stating the date and hour of such record: (sect. 67.)

Importance of getting mortgage registered immediately after execution.—No time should be lost in getting the mortgage registered; for a subsequent mortgagee of the same shares, if he were to register his mortgage first, would thereby obtain a priority, notwithstanding he might have had any express, implied, or constructive notice of the previous incumbrance; mortgagees under this act being entitled in priority one over another according to the date in which each instrument is recorded in the register book, and not according to the date of the instrument itself: (sect. 69.) Added to which, a registered mortgage will not be affected by a subsequent act of bankruptcy of the mortgagor: (sect. 72.)

Mortgages of interests in shipping formerly liable to be defeated by mortgagor's bankruptcy.—Previously to the acts 4 Geo. 4, c. 41; 6 Geo. 4, c. 110; 8 & 9 Will. 4, c. 55; 8 & 9 Vict. c. 86; and 17 & 18 Vict. c. 104, the title of a mortgagee was liable to be defeated by the bankruptcy of the original owner and mortgagor, or assignor of the ship,

still continuing in possession; but now, any assignment of a ship or vessel by way of mortgage, if duly registered according to the provisions of the above-mentioned acts, will not be affected by any act of bankruptcy committed by the mortgagor after the time when such assignment shall have been so registered, notwithstanding the mortgagor shall, at the time he shall so become bankrupt, have in his possession or be the reputed owner of the ship: (17 & 18 Vict. c. 104, s. 72.)

Of the interest and power of disposition which a mortgagee acquires in the mortgaged property.—When the mortgage is registered the assurance is complete; still, this does not wholly divest the ownership of the mortgagor, or vest it in the mortgagee, the former still continuing owner, except so far as may be necessary for making the ship, or the mortgaged shares therein, available as a security for the mortgage debt: (sect. 70.) But every registered mortgagee has, as we have previously noticed, an absolute power of sale conferred upon him, and may dispose of the ship, or of such shares as have been mortgaged to him, and in respect of which he is registered, and give effectual releases and discharges for the purchase moneys; but if there are several registered mortgagees of the same ship or shares, no subsequent mortgagee shall, except under the order of some court capable of taking cognizance of such matters, sell such shares without the concurrence of every prior mortgagee: (sect. 71.)

Power to mortgage may be conferred by certificate.—Any registered owner, who is desirous of effecting a mortgage of any ship or share in respect of which he is registered, at any place out of the country or possession in which the port of registry of such ship is situate, may apply to the registrar, who shall thereupon enable him to do so by granting such certificates as are hereinafter mentioned, to be called respectively certificates of mortgage: (sect. 76.)

Requisitions for granting certificate.—Previously to the granting of such certificate, the applicant is required to state to the registrar, to be by him entered in the register book, the following particulars (that is to say):

1. The names of the persons by whom the power mentioned in such certificate is to be exercised, and the maximum amount of charge intended to be created if it is intended to fix any such maximum.

2. The specific place or places where the power is to be exercised, or if no place be specified, then it may be exercised anywhere, subject to the provisions hereinafter contained.
3. The limit within which the power may be exercised.

Requisitions of certificates of mortgage.—No certificate shall be granted so as to authorize any mortgage to be made at any place within the United Kingdom, if the port of registry of the ship be situate in the United Kingdom; or at any place within the same *British* possession, if the port of registry is situate within a British possession; or by any person not named in the certificate: (sect. 78.)

Forms of certificate.—The certificates are to be in the forms marked respectively M. & N. in the schedule annexed to the act, and are to contain a statement of the several particulars thereinbefore directed to be entered in the register book, and in addition thereto, an enumeration of any registered mortgages or certificates of mortgage or sale affecting the ships or shares in respect of which such certificates are given: (sect. 79.)

Rules to be observed.—The following rules must also be observed:—

1. The power shall be exercised in conformity with the directions contained in the certificate.
2. A record of every mortgage made thereunder shall be indorsed thereon by a registrar or British consular officer.
3. No mortgage *bonâ fide* made thereunder shall be impeached by reason of the person by whom the power was given dying before the making of such mortgage.
4. Whenever the certificate contains a specification of the place or places at which, and a limit of time not exceeding twelve months within which the power is to be exercised, no mortgage *bonâ fide* made to a mortgagee without notice shall be impeached by reason of the bankruptcy or insolvency of the person to whom the power was given.
5. Every mortgage which is so registered as aforesaid on the certificate, shall have priority over all mortgages of the same ship or share created subsequently to the date of the entry of the certificate in the registry book; and if there be more mortgages

than one so indorsed, the respective mortgagees claiming thereunder shall, notwithstanding any express, implied, or constructive notice, be entitled one before another, according to the date at which a record of such instrument is indorsed on the certificate, and not according to the date of the instrument creating the mortgage.

6. Subject to the foregoing rules, every mortgagee whose mortgage is registered on the certificate shall have the same rights and powers, and be subject to the same liabilities, as he would have been subject to if his mortgage had been registered in the register book instead of on the certificate.
7. The discharge of any mortgage so registered on the certificate may be indorsed thereon by any registrar or British consular officer upon the production of such evidence as is hereby required to be produced to the registrar on the entry of a discharge of a mortgage in the register book; and upon such indorsement being made, the estate, if any, which passed to the mortgagee, shall vest in the same person or persons in whom the same would, having regard to intervening acts and circumstances, if any, have vested if no such mortgage had been made.
8. Upon the delivery of any certificate of mortgage to the registrar by whom it was granted, he shall, after recording in the register book in such manner as to preserve its priority any unsatisfied mortgage registered thereon, cancel such certificate, and enter the fact of such cancellation in the register book; and every certificate so cancelled shall be void to all intents.

Power of Commissioners of Customs in case of loss of certificate.—Upon proof at any time to the satisfaction of the Commissioners of Customs that any certificate of mortgage is lost, or so obliterated as to be useless, and that the powers thereby given have never been exercised, or if they have been exercised, then upon proof of the several matters and things that have been done thereunder, the registrar is empowered, with the sanction of the commissioners, as circumstances may require, either to issue a new certificate, or to direct such entries to be made in the register book, or such other act, matter, or thing to be done as might have been made or done if no such loss or obliteration had taken place: (sect. 82.)

Revocation of certificate.—The registered owner for the time being of any ship or share therein in respect of which a certificate of mortgage has been granted, specifying the place or places where the power thereby given is to be exercised, may, by any instrument under his hand made in the Form O. in the schedule annexed to the act, or as near thereto as circumstances will permit, authorize the registrar by whom such certificate was granted, to give notice to the registrar or consular officer at such place or places that such certificate is revoked; and notice shall be given accordingly; and all registrars or consular officers receiving such notices shall record the same, and shall exhibit the same to all persons who may apply to them for the purpose of effecting or obtaining a mortgage or transfer under the said certificate of mortgage or sale; and after such notice has been so recorded, the said certificate shall, so far as concerns any mortgage or sale to be thereafter made at such place, be deemed to be revoked; and every registrar or consular officer recording any such notice, shall thereupon state to the registrar to whom such certificate was granted whether any previous exercise of the power to which such certificate refers has taken place.

Where the ship is insured.—If the ship has been insured, the mortgagee's solicitor should obtain an assignment of such insurances from the mortgagor, and give immediate notice thereof to the underwriters. The assignment must contain a power of attorney to sue for the moneys recoverable in respect of such insurances, and give receipts for the same in the name of the assignor or otherwise. And it must also be remembered, that such assignments will require an *ad valorem* stamp proportioned to the amount of the sum advanced upon the mortgage security (*Colwell v. Dawson*, 14 L. T. Rep. 468), although the mortgage of the ship to which they relate is free from all stamp duty whatever: (6 Geo. 4, c. 41.)

Propriety of authorizing mortgagees to insure when no insurance has been previously effected.—If the ship is not insured, it will be a prudent plan to authorize the mortgagees to effect such assurance, with a covenant from the mortgagor to repay all sums of money so expended upon demand, with interest from the time of such expenditure, and that until such repayment, the sums so expended shall be in the nature of a further charge upon the mortgaged shares in the ship.

V. MORTGAGES OF HOUSEHOLD FURNITURE AND OTHER MOVEABLE EFFECTS.

Assignments of household furniture, how far valid as mortgage securities.—It has been some time decided, although formerly doubted, that an assignment of household furniture and other moveable effects will afford a valid mortgage security, even as against creditors, until the right of redemption becomes legally forfeited by the mortgagor's default in payment of principal and interest at the appointed time (*Bucknall v. Roiston*, Pre. Cha. 289; *Martindale v. Booth*, 3 B. & A. 489); and even before the abolition of the Usury Laws by the act 17 & 18 Vict. c. 90, mortgages of household furniture and other moveables, as they did not fall within the description of loans upon the security of any lands, tenements, or hereditaments, were not affected by any of those laws; consequently a higher rate of interest than five per cent. might have been, and often was, reserved in assurances of this nature.

Disadvantages incidental to a mortgage of household furniture, &c.—The disadvantages incidental to a mortgage of household furniture, or other moveables, were—

1. That after default in payment, the mortgagee's estate becoming absolute, acquired the same incidents and properties as in the case of an absolute sale, the latter of which, as distinguished from a mortgage security *before default*, would, where the original owner was permitted to retain the visible ownership, have been considered as indicative of fraud, and therefore void as against creditors, who might possibly have been deceived thereby: (*Bucknall v. Roiston*, *supra*.)

2. Where the furniture or other moveables were contained in a rented house, the landlord's right to distrain them for his rent would have overreached the mortgagee's title.

3. Mortgages of this kind were not allowed to prevail against the assignees of a bankrupt, or of an insolvent debtor.

Difficulties how partially remedied.—The difficulty with respect to the visible ownership might have been in some measure obviated by postponing the time of redemption to some distant day beyond the usual limit in ordinary mortgage assurances, or to such time as the mortgagee should by writing appoint (see a clause of this kind, 1 Con. Prec., No. LXXIII., clause 5, 1st edit.); but the two other diffi-

culties, namely, the predominant right of landlords to distrain where the goods were contained in a house rented of him, and the superior claims of the assignees, in case of the mortgagor's bankruptcy or insolvency, were found to be insurmountable.

Alterations in the law effected by recent enactments.—But the law in all the above respects has been considerably altered by the recent act of Parliament (17 & 18 Vict. c. 36), intituled “An Act for preventing Frauds upon Creditors by Secret Bills of Sale of Personal Chattels,” which enacts, “That every bill of sale of personal chattels made after the passing of this act (10th July, 1854) either absolutely, or conditionally, or subject or not subject to any trusts, and whereby the grantor or holder shall have power, either with or without notice, and either immediately, or after the making of such bill of sale, or at any future time, to seize or take possession of any property or effects comprised in or made subject to such bill of sale; and every schedule or inventory which shall be thereto annexed or therein referred to, or a copy thereof, shall, together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person against whom such proofs shall have issued, and of every attesting witness to such bill of sale, be filed with the officer acting as clerk of the docquets and judgments in the Court of Queen's Bench, *within twenty-one days after the making or giving of such bill of sale* (in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed), otherwise such bill of sale shall, as against all assignees of the estate and effects of the person whose goods or any of them are comprised in such bill of sale under the laws relating to bankruptcy or insolvency, or under any assignment for the benefit of creditors of such person, and as against all sheriffs' officers and other persons seizing any property or effects comprised in such bill of sale in the execution of any process of any court of law or equity authorizing the seizure of the goods of the person by whom or of whose goods such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes, so far as regards the property or right to the possession of any personal chattels comprised in such bill of sale, which at or after the time of such bankruptcy, or of filing the insolvent's petition in such insolvency, or to the execution by the debtor of such assignment for the benefit of his

creditors, or of executing such process, as the case may be, in the possession or apparent possession of the person making such bill of sale, or of any person against whom the process shall have issued, under or in the execution of which such bill of sale shall be made or given, as the case may be :” (sect. 1.) (See the form of affidavit to be filed with bill of sale, 2 Con. Prec., Part V., Section VI., No. XII., p. 291, 2nd edit.)

Defeasance should be written on bill of sale.]—“Where the bill of sale is made subject to any defeasance or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration of trust shall, for all the purposes of this act, be taken as part of such bill of sale, and shall be written on the same paper or parchment on which such bill of sale shall be written before the time when the same, or a copy thereof, shall be filed, otherwise such bill of sale shall be null and void to all intents and purposes as against the same persons, and as against the same property and effects, as if such bill of sale, or a copy thereof, had not been filed according to the provisions of this act :” (sect. 2.)

Officer of court to keep a book containing particulars of each bill of sale.]—“The officer of the court is to keep a book containing an alphabetical list of every such bill of sale, containing therein the name, addition, and description of the person making or giving the same; or in case the same shall be made or given by any person under an execution of any process as aforesaid, then the name, addition, and description of the person against whom such process shall have issued, and also of the person to whom or in whose favour the same shall have been given, together with the number and dates of the execution, and filing of the same, and the sum for which the same has been given, and the time or times (if any) when the same is thereby made payable, according to the form contained in the schedule to this act, which said book or books, and every bill of sale, or copy thereof, filed in the said office, may be searched and viewed by all persons at all reasonable times, paying to the officer for every search against one person the sum of sixpence; and that in addition to the last-mentioned book, the said officer shall keep another book or index, in which he shall cause to be fairly inserted, as and when such bills of sale are filed in manner aforesaid, the name, addition, and description of the person making or giving the same, or of the person

against whom such process shall have issued, as the case may be, as also of the persons to whom or in whose favour the same shall have been given, but containing no further particulars thereof; which last-mentioned book or index all persons shall be permitted to search for themselves, paying the officer for such last-mentioned search the sum of one shilling:" (sect. 3.)

Office copies or extracts to be given.—“Any person is entitled to have an office copy or extract of every bill of sale, or a copy thereof, filed as aforesaid, upon paying for the same at the like rate as for copies of judgments in the said Court of Queen's Bench:" (sect. 5.)

Satisfaction may be entered.—“A judge of the court is authorized to order a memorandum of satisfaction to be written upon any bill of sale, or copy thereof, where it shall appear that the debt thereby secured has been satisfied:" (sect. 6.)

Interpretation of terms.—“In construing this act, the following words and expressions are directed to have the meaning thereby assigned to them, unless there is something in the subject or context repugnant to such construction (that is to say):

What will or will not be comprehended under the term bill of sale.—“The expression ‘bill of sale’ shall include bills of sale, assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels as security for any debt, but shall not include the following documents; that is to say, assignments for the benefit of creditors of the person making or giving the same; marriage settlements, transfers or assignments of any ship or vessel, or any share thereof; transfer of goods in the ordinary course of business of any trade or calling; bills of sale of goods in foreign parts, or at sea; bills of lading; India warrants, warehouse-keepers certificates; warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business, as proof of the possession or control of goods, or authorizing or purporting to authorize either by indorsement, or by delivery, the possession of such document to transfer or receive the goods thereby represented:" (sect. 7.)

What will be included under the term personal chattels.—“The expression ‘personal chattels’ shall mean goods,

furniture, fixtures, and other articles capable of complete transfer by delivery, and shall not include chattel interests on real estates, or shares or interests in the stocks, funds, or securities of any government, or in the capital or property of any incorporated or joint stock company, nor choses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement, or of the custom of the country, ought not to be removed from any farm or lands where the same shall be at the time of the making or giving of such bill of sale:" (*ib.*)

What shall be deemed to be visible ownership of chattels personal..]—Personal chattels shall be deemed to be in the apparent possession of the persons making or giving the bill of sale, so long as they shall remain or be in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or as they shall be used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken or given to any other person: (*ib.*)

How mortgage deed of household furniture, and other moveables, should be penned..]—In preparing a mortgage deed of household furniture, or other moveable effects, the instrument, after setting out date, the names, place of residence, and occupation of the parties, and a short recital of the agreement for loan ought to contain an assignment by the mortgagor of the goods, which should be specified and set forth in a schedule annexed thereto, unto the mortgagee, with a condition or defeasance for avoiding the assurance upon payment by the mortgagor of the principal moneys and interest on receiving a written demand from the mortgagee to that effect; to these should be added clauses containing power of sale in default of payment; as also to seize and carry off the assigned effects; followed by a declaration of trust that after deducting expenses of sale, the mortgagee is to retain his principal moneys and interest, and pay over the surplus moneys, if any, to the mortgagor. The usual covenants are general covenants from the mortgagor for payment of principal moneys and interest on demand, and that in the meantime he will pay the interest half-yearly, or at some other stated periods; and also to insure against damage by fire; and the mortgagee enters into qualified covenants for quiet enjoyment by the mortgagor until default: (see the form 2 Con. Prec., Part V., Section VI., No. X., pp. 283 to 287, 2nd edit.)

When the assurance is intended to comprise after-acquired property.].—An assignment of personal chattels is incapable of passing after-acquired property; still that object, when desired, may be attained by merely adding a power of attorney to the mortgage deed. To accomplish this, the mortgagor appoints the mortgagee, his attorney authorizing the latter, in his name, to make a perfect assignment of any goods not legally passing under this present assignment to which the mortgagor shall, during the continuance of the mortgage security, become entitled, or over which he shall acquire any beneficial power of disposition: (see the form 2 Con. Prec., Part. V., Section VI., No. X., clause A., *in notis*, p. 284, 2nd edit.)

Steps necessary to confer the benefit of after-acquired property upon mortgagees.].—In order that the mortgagee may acquire the benefit of such after-acquired property when it has actually accrued to the mortgagor, it will be necessary for the former to vest such property in some third party, to hold in trust for him, which he must do by making an assignment of the after-acquired property to such trustee in the mortgagor's name, under the power of attorney for that purpose limited to him by the mortgage deed: (see the form of assignment, 2 Con. Prec., Part V., Section VI., No. XI., p. 288, 2nd edit.)

Necessary steps to secure the validity of the mortgage security.].—As soon as the deed of assignment is executed, an affidavit in the form already pointed out should be prepared and sworn. This affidavit must, as we have previously noticed, contain the time at which such bill of sale was made, and also the description of the residence and occupation of the maker, or when given by a person under execution of any process, a description of the residence and occupation of the person against whom such process shall have issued, as also of every attesting witness; and care must be taken that the description, in compliance with the above requisitions, be full and accurate in every particular, otherwise the affidavit will not be received. No time, either, ought to be lost in getting the affidavit filed, which, as we have already remarked, must be done within the space of twenty-one days after the making of such bill of sale, otherwise the bill of sale will become void.

VI. MORTGAGES OF MIXED KINDS OF PROPERTY.

All kinds of property capable of being mortgaged may be contained in the same instrument.]—The same instrument may be made to contain every kind and description of property that is capable of being made the subject-matter of a mortgage security; nor does the objection to including real and personal estate, or property of different tenures, in the same deed, on account of the various kinds of properties being transmissible to a different course of representatives all claiming beneficially under the same assurance, hold in the case of a mortgage security, because, in that case, in whatever course the legal estate may be transmissible, the personal representatives of the mortgagee are the persons who are really beneficially interested, and as such are entitled to the custody of the title deeds and other documents of title; the heir taking no more than a mere dry and unprofitable legal estate, which he is bound to convey according to their directions, and possessing no other control over the property than what is for their exclusive benefit.

How mortgages of mixed property should be penned.]—Where the property which is to form the mortgage security consists of freehold and leasehold, or of freehold and copyhold property, the freehold should be inserted first; if it consists of freehold, leasehold, and copyhold estates, the freeholds should be first inserted, then the leaseholds, and afterwards the copyholds: (see a form of this kind, 2 Con. Prec., Part V., Section VII., No. I., p. 296, *et seq.*, 2nd edit.) If chattels personal are to be included in the same instrument, they should generally be inserted after the chattels real, or the copyholds, if either of the latter kinds of property are included in the assurance. But where such chattels consist of fixtures annexed to the freehold, or machinery or implements employed for the purposes of trade, it will be proper to add these to the description of the particular parcels to which they appertain, and to enumerate and particularize them in a schedule annexed to the mortgage deed.

Propriety of inserting a power to redeem in parcels, and that powers of sale shall be first exercised upon certain portions of the mortgaged property.]—In all mortgages of mixed kinds of property, it will be advisable to give the mortgagor a power to redeem in parcels; as also to provide, where there is a power of sale, that certain specified portions of the property shall be first applied for the purpose of satisfying the

mortgage, and directing that none of the remaining portions shall be so appropriated until that which is first mentioned shall have proved insufficient: (see the form 2 Con. Prec., Part V., Section VII., No. II., clause 16, p. 314, 2nd edit.) A clause of this kind is often of the utmost importance to the interests of the mortgagor, particularly where some portion of the mortgaged property consists of a life estate, or of a reversionary interest; or its enjoyment depends upon a contingency; or where the property is of a fluctuating nature, as money in the funds, mining interests, whether in the form of dues or shares, shares in railways, bridges, or canals, or other interests of a similar kind, which at certain times can only be sold at a great pecuniary sacrifice; and at the same time that other kinds of property included in the same mortgage assurance of a less changeable value, as landed property, for instance, might be sold without any pecuniary sacrifice whatever, and prove fully adequate for the required purposes. The power of being enabled to redeem in parcels is always advantageous to a mortgagor, and particularly so where any of the mortgaged property is of a fluctuating nature, as by redeeming a portion which has become enhanced in value he may take advantage of the market, and thus realize a considerable profit, which he would have been unable to do if compelled first of all to redeem the whole of the mortgaged property.

VII. BONDS AND WARRANTS OF ATTORNEY FOR SECURING THE PAYMENT OF A DEFINITE AND CERTAIN SUM OF MONEY.

1. Bonds.
2. Warrants of attorney.
3. Post obit bonds.

1. Bonds.

Where the bond is given as an original security.—The form of a bond given as an original security for the payment of a definite and certain sum of money is a very simple one, by which the obligor binds himself in a penal sum in double the amount of the money secured, conditioned to be void on payment of the sum really secured, either on demand or on some appointed day: (see the form 2 Con. Prec., Part V., Section XI., No. I., p. 405, 2nd edit.)

When given as a collateral security.—If given as a collateral security, it will then be proper to insert at the end of the condition for payment of principal and interest that the

sum thereby secured is the same as is secured by the original security, setting out the date, parties, &c. to the latter instrument, so as clearly to identify it: (see the form 2 Con. Prec., Part V., Section XI., No. I., *in notis*, 2nd edit.)

Where the money secured is to be repaid by instalments.]—If the money secured is to be repaid by instalments, there should be inserted, immediately after the exordium, a recital of the loan, and of the arrangement by which the obligee is to receive the repayment by instalments; with a condition for avoiding the bond if such instalments are paid accordingly: (see the forms 2 Con. Prec., Part V., Section XI., Nos. II. and III., pp. 407, 408, 2nd edit.)

Advantages of a bond over a deed of covenant where money is to be paid by instalments.]—Where money is to be paid by instalments, a bond affords a more advantageous security than a covenant; because, in the former case, an action may be brought upon the bond in case default should be made in payment of any one of the instalments; whereas, if the remedy is upon covenant, no action will lie before all the instalments become payable. The reason of this distinction is, that in covenant, the contract being entire, no breach can be incurred until the last instalment becomes due; whereas, in the case of a bond, a distinct contract arises upon each instalment, so that if default is made in the payment of any one of them, a breach will be thereby incurred: (*Rudd v. Price*, 2 H. Blackst. 547; *Coates v. Hewitt*, 1 Wils.)

Where the bond is entered into by one or more obligors, or with sureties.]—Where a bond is given by one or more obligors; or if sureties concur in the obligation, they should be jointly and severally bound; for if only jointly bound, in case one of the obligors were to die, his representatives would be wholly discharged at law, and in most instances in equity also: (*Towers v. Moore*, 2 Vern. 99; see the form of a joint and several bond, 2 Con. Prec., Part VI., Section II., No. X., p. 552, 2nd edit.)

When equity will hold the representatives of a joint obligor liable upon a joint bond.]—Still, in certain cases which particularly call for the aid of a court of equity, as where a joint bond has, by mistake, been given where a joint and several bond was intended, and the parties were ignorant of the distinction between the operation of the two instruments (*Gray v. Cheswell*, 9 Ves. 125; *Underhill v. Horwood*, 12 ib.

277); or where a joint bond has been given for a partnership debt (*Devaynes v. Hoble*, 1 Mer. 505); or where it relates to any transactions in which all the parties bound have been individually benefited, as where several persons give a joint bond to secure a banking account, upon which each may receive advances (*Thorpe v. Jackson*, 2 You. & Coll. 553); in all such cases equity will consider, that notwithstanding the bond is joint in form, the real intention of the parties is that its operation shall be both joint and several: (*Braithwaite v. Britain*, 1 Kee. 206.)

2. Warrants of Attorney.

As to form of warrant of attorney.—A warrant of attorney to secure the payment of a definite sum of money authorizes certain attorneys to enter up judgment against the debtor in a sum of money double the amount intended to be secured, with a defeasance annexed thereto, by which it is agreed that no execution shall be sued out upon the judgment until default shall be made in payment of the principal moneys and interest thereby secured.

Where the warrant of attorney is given as a collateral security.—Where a warrant of attorney is given by way of collateral security, a recital of such collateral security should precede the defeasance: (see the form 2 Con. Prec., Part V., Section XI., No. VIII., clause 1, p. 420, 2nd edit.)

Warrant of attorney must be filed within twenty-one days.—No time should be lost after the warrant of attorney is given in getting it filed, as every warrant of attorney, or a true copy thereof, and of the attestation thereof, and the defeasance and indorsements thereon in case such warrant be to confess judgment in the Court of Queen's Bench—or such true copy, in case the warrant be to confess judgment in any other court—must, within twenty-one days after the execution thereof, be filed, together with an affidavit of the time of the execution thereof, with the clerk of the dockets and judgments of the Court of Queen's Bench, otherwise it will be void as against the assignees of the party in case he should afterwards become bankrupt or insolvent: (3 Geo. 4, c. 39, s. 1; *Hurst v. Jennings*, 5 B. & C. 650; 12 & 13 Vict. c. 106, s. 136; *Acraman v. Hernaman*, 19 L. J. 355, Q. B.) The twenty-one days are reckoned one day inclusive, the other exclusive; hence a warrant of attorney executed on the 9th may be filed on the 30th day of the same month (*Williams*

v. *Burgess*, 12 Ad. & Ell. 635), and the affidavit of execution may be accordingly: (*Robinson v. Robinson*, 3 Dowl. & Lo. 134.) But unless filed within the twenty-one days, it cannot at any distance of time be made available in the event of the bankruptcy or insolvency of the party giving it, notwithstanding the judgment may have been entered up, execution issued, and seizure and sale of the goods effected long before the act of bankruptcy or imprisonment of such party, and on fraud being in fact suggested: (*Bittleston v. Cooper*, 14 Mees. & Wels. 399.)

3. *Post obit Bonds.*

For what purposes usually given.—Post obit bonds may be given to secure a present advance, or debts already incurred. As payments thus secured are always deferred until the death of some party named in the bond, and are often rendered extremely precarious by being made payable only upon the contingency of the borrower or debtor surviving such party, the actual value of a security of this nature must necessarily vary in proportion to the probable delay in payment, or risk incurred of ultimate loss by failure of the contingent event upon which alone such payment is to be made.

Where the bond is given in consideration of a present payment.—Where a post obit bond is given in consideration of a present payment of money to the obligor, the instrument is penned in much the same form as an ordinary bond to secure the payment of a definite sum of money. It contains the usual exordium, with a penalty in double the amount of the sum intended to be secured. It recites the agreement by which the obligor, in consideration of a present payment of a certain sum, as 500*l.*, for instance, is to pay the obligee a certain sum, as 1,000*l.*, for instance, in the event, but not otherwise, of the obligor surviving some party named, generally his father, or some other relation or person upon whose decease he is to succeed to property; with a condition for avoiding the bond in case the obligor shall survive the party named, and pay the 1,000*l.*, or shall die in the lifetime of the party; in which latter case the obligee will lose his money.

Where a warrant of attorney is given as a collateral security.—A bond of this kind is generally accompanied by a warrant of attorney, in which the bond is recited; and the defeasance declares the warrant of attorney to be given as a

security for payment to the obligee of the money thereby secured, in case the obligor shall outlive the party upon whose decease it is to become payable; but that no execution is to be taken out under the warrant of attorney unless that event shall actually take place, or if the obligor, in that event, shall pay the obligee the sum thereby secured and in that event become payable.

Where the bond is given to secure a debt already incurred.]

Where a bond of this kind is given as a consideration for the release of a pre-existing debt, after the usual exordium, the instrument should recite the amount and nature of the debt, and the obligor's inability to discharge it during the lifetime of the party upon whose decease the post obit payment is to be made, followed by the agreement of the creditor or obligee to release him therefrom, upon his giving a post obit bond payable upon such party's decease, and also a recital that such release has been given accordingly, with a condition for avoiding the bond upon payment of the money thereby secured within some specified time after the death of the party upon whose decease it is made payable, or by the decease of the obligor in such party's lifetime.

As to redemption of post obit bonds.]—Sometimes a power is reserved to redeem either the whole or some part of the expectant sum, by paying the obligee an adequate sum for such entire or partial redemption during the lifetime of the party upon whose decease such expectant sum is to become payable. The difficulty in such case is to arrange what is to be considered an adequate sum to be given for either of the above purposes. But the fairest and easiest way to get over this difficulty, is to stipulate in the condition of the bond that the amount shall be determined by some actuary or other person well skilled in transactions of this nature; as, for example, that—

“In case the said (*obligor*) shall at any time during the lifetime of the said (*party upon whose decease the money is to be payable*) be desirous to redeem the said expectant sum of £ , or any part of the same, and shall give days previous notice in writing to the said (*obligee*), his executors, administrators, or assigns, or leave the same at his or their last or usual place of abode or business in England, and shall, at the end of days after which such notice shall be given, well and truly pay or cause to be paid unto the said (*obligee*), his executors, administrators, or assigns, such sum or sums of money as the actuary for the time being of the LAW PROPERTY ASSURANCE AND TRUST SOCIETY (or of some other respectable Insurance Office) shall deem a reasonable price for such total or partial redemption, as the case may be, at the time of such redemption; and also, if, in the event of any

such total or partial redemption as aforesaid, the said (*obligor*), his heirs, executors, or administrators, shall, within six calendar months next after the decease of the said (*party upon whose decease money is to be payable*), well and truly pay unto the said (*obligee*), his executors, administrators, or assigns, so much of the said sum of £ as shall not have been redeemed as aforesaid: THEN, or in either of such cases, the above-written bond to be void," &c.

Where the bond is to be kept sealed up until the death of the party upon whose death it is to become payable.—Sometimes it is arranged that a post obit bond is to be sealed up in an envelope and delivered into the custody of a third person, who is to keep it so sealed up during the lifetime of the party upon whose decease it is to become payable, unless sooner redeemed. When this occurs, it will be necessary to have a written memorandum setting out the terms upon which such deposit is to be made. The best mode appears to be to recite the post obit bond, the agreement that it shall be sealed up in an envelope and deposited with the depositary, and be retained by the latter during the lifetime of the party upon whose decease the money is to become payable, with a declaration that the bond shall be kept so sealed up during the whole of that period, unless the bond shall be sooner redeemed, concluding with a proviso that if the bond be partially redeemed, the amount of such redemption shall be indorsed thereupon.

Duties of obligor's solicitor.—The solicitor employed on behalf of the obligor should use his utmost vigilance to prevent, as far as possible, a hard and unconscionable bargain being enforced upon his client, as too often occurs in transactions of this nature, but which most frequently takes place from the fact of no professional man being employed by either party throughout the whole of the transaction, or by the omission of the obligor to employ any one to act on his behalf. The obligor's solicitor, also, when the bond is given to secure payment of debts already incurred in consideration of forbearance on the creditor's part, should be particularly careful to see that his client has a formal release executed to him, effectually exonerating him from this liability.

CHAPTER VI.

MORTGAGES BY WAY OF FURTHER CHARGE; TRANSFERS
OF MORTGAGE; AND ASSIGNMENT OF BONDS.

I. MORTGAGES BY WAY OF FURTHER CHARGE.

II. TRANSFERS OF MORTGAGES.

1. Where the mortgagor is not a concurring party.
2. Where the mortgagor is a concurring party.

III. ASSIGNMENT OF BONDS.

I. MORTGAGES BY WAY OF FURTHER CHARGE.

Usual practice in mortgages by way of further charge.—If a mortgagor requires a further sum of money, and the mortgagee is willing to advance it, the usual practice is to secure its repayment by way of a further charge upon the mortgaged premises. This, if the property is of ample value, is a very simple transaction, because the title having been already investigated, little, if anything more remains to be done than to settle the terms and proceed at once to prepare the assurance by which the further charge is to be secured. Still, before doing this, the mortgagee should satisfy himself there are no subsequent incumbrances on the property; for notwithstanding a mortgagee will not be prejudiced by any intermediate incumbrances of which he has no notice, still parties may be fixed with what is considered as notice in the eye of the law without having any actual knowledge whatever of the transaction; as in the case of notice to the agent, which in law is considered as notice to the principal, although the latter may be utterly ignorant of the whole matter. Where a mortgagee incurs the greatest risk in transactions of this kind, is where the same solicitor

acts both on behalf of himself and the mortgagor, who, if he has notice of any mesne incumbrance, will have the same effect as actual notice to the mortgagee himself, the latter of whom, in consequence, will lose all advantage in the priority he would have secured in the absence of such notice, and the mesne incumbrance will thus become preferred to the further charge: (*Montague v. Ratcliffe*, 2 Fonbl. Eq. 434, n. p.)

Distinction as to priority, where original mortgage is for a fixed sum, and when made to secure future advances.—It must, however, be observed, that the above rule only holds where the original mortgage is for a certain fixed and stated sum; for where a mortgage is made to secure further advances, a subsequent loan in pursuance of those terms would obtain a priority over a second mortgage, notwithstanding the first mortgagee had express notice of the second mortgage at the time he made his further advance: (*Gordon v. Graham*, 2 Vin. Abr. 52; *Coote Mort.* 513; 2 *Hughes Pract. Mort.* 4.)

Where additional property is added.—It often happens that where a further charge is made, additional property is either given, or a larger estate than he took under his original mortgage is granted to the mortgagee, in consideration of his further advance; as where the mortgage was by demise, and the further charge is to be in fee, which latter assurance is made to secure the original advance as well as the further charge. If additional property is added, the title to this property ought of course to undergo the same investigation as upon an original mortgage; but when the estate of the mortgagee is merely to be enlarged, if there has been a proper investigation of the title prior to the original mortgage, a reinvestigation would be superfluous.

Assurances by way of further charge, how usually prepared.—Further charges are made either by indorsement on the original mortgage deed, or by a distinct instrument; but in the country, particularly in the case of small advances, where the amount of stamp duty is small, a preference is given to a distinct instrument to save the trouble and expense of sending the original mortgage to London to get a stamp impressed upon the indorsed further charge, the costs of which would often exceed the actual amount of the stamp duties, the latter of which are usually considered the most vexatious expense connected with a mortgage transaction. But when the deed of further charge is executed in London, where the

instrument may be stamped without difficulty or additional expense, it is found convenient to have the further charge indorsed on the original mortgage deed, for the purpose of keeping the whole subject-matter of the business connected together.

Where the further charge is to convert arrears of interest into principal.—Making the further charge by indorsement on the original mortgage is also found particularly useful where the further charge is merely given to convert arrears of interest into principal, so as to carry future interest. This may be done by a very short form, stating the amount of interest then owing on the within-written security, and that the same shall be a further charge on the mortgaged premises, and shall carry interest at the rate therein mentioned: (see the form 2 Hughes Pract. Mort., Prec.²I., No. III., p. 18.)

How arrears of interest may be converted into principal.—There is no doubt whatever of the legality of a charge of this kind; for although, as a general rule, interest cannot be so reserved in a mortgage deed as to carry interest, still this only holds as long as the interest is payable as such; for after it has been due, and is an actual existing debt, it may then be converted into principal, and thus be made the subject-matter of any agreement the mortgagor may enter into respecting it, and may be made to carry interest in the same manner as may be reserved upon any other sums of money owing from the one party to another: (*Bonham v. Riley*, 2 Bro. C. C. 2; *Bickham v. Cross*, 2 Ves. 471.)

How deed of further charge is usually penned.—A deed of simple further charge, after describing the parties, recites the original mortgage, and that the principal money and the amount of interest, if any, that is then due, and the request of the mortgagor for a further advance on the security of the mortgaged premises, and then the mortgagor further charges such mortgaged premises with the further advance, and future interest to accrue due thereon, in addition to the original mortgage debt and interest then already secured; and, where the original mortgage deed contains a power of sale, it is also declared that such power of sale shall extend to the further advance, which further advance and interest the mortgagor then proceeds to covenant to pay, and also to execute any further assurances, for the purposes aforesaid, which the mortgagee may require: (see the form 2 Con.

Prec., Part V., Section VIII., No. I., pp. 319, 324, 2nd edit.)

Where the further charge is to cover future advances as well as an existing debt.—If the further charge is intended to cover future advances as well as a present advance or existing debt, the deed, after describing the parties and reciting the original mortgage, and the amount of principal moneys and interest, if any, then due thereon, and also that the mortgagor requires a further advance, and that, in order to secure the same and such future advances as the mortgagee may make him, he will further charge the mortgaged premises therewith, then proceeds to make such further charge in the form we have just before pointed out: (see a form of this kind 2 Con. Prec., Part V., Section VIII., No. III., pp. 327, 328, 2nd edit.)

Where more property is added by way of additional security.—Where more property is added by way of additional security upon a further charge, the original mortgage is usually recited, as also the amount of principal and interest due thereon, and the agreement for the further advance; the mortgagor then proceeds to further charge the mortgaged premises with the further advance and interest in addition to the principal moneys and interest already secured thereon, and then conveys or assigns the additional property, according to the nature and quality of such property, to the mortgagee, with a declaration that the power of sale contained in the original mortgage deed shall extend to the additional property and further charge (see the form 2 Con. Prec., Part V., Section VIII., No. IV., pp. 331, 334, 2nd edit.), or it may contain a fresh proviso for redemption and fresh powers of sale: (see the form *ib.* No. IV., p. 331.)

Propriety of inserting a power for mortgagor to redeem in parcels.—Where additional property is given upon a further charge, or even where distinct estates are embraced in an original mortgage security, it is advantageous for the mortgagor to be authorized to redeem in parcels; for in the absence of a stipulation to that effect, where several estates are all mortgaged by the same mortgagor to the same mortgagee, the former will not be entitled to redeem any one or more of such estates without redeeming the whole of them, notwithstanding such mortgages may have been made at distinct and separate times to secure several and distinct debts, and by several and distinct assurances: (*Trebourg v.*

Lord Pomfret, cited *Ambl.* 733; *Roe ex dem. Kaye v. Soley*, 2 W. Blackst. 726.) Neither will the circumstance that the property comprised in such mortgages is of different tenures, as where part consists of freehold, and part of leasehold or copyhold estates, vary the rule in any respect: (*Jones v. Smith*, 2 Ves. jun. 376; 6 *ib.* 229, *in notis.*)

Where household furniture, &c., is assigned by way of additional security.—It often happens that where a further advance is made upon a furnished dwelling-house, the furniture is assigned by way of additional security. Whenever this occurs, care must be taken to comply with all the conditions prescribed by the statute 17 & 18 Vict. c. 36, relating to bills of sale of furniture and other moveable effects (as to which see *ante*, p. 108); otherwise the assignment will be inoperative as against the mortgagor's assignees in case of his becoming bankrupt or insolvent, or sheriffs' officers and other persons seizing the goods, &c., in execution of any process against him, whenever the same shall continue to remain in his apparent possession: (17 & 18 Vict. c. 36, s. 1.)

II. TRANSFERS OF MORTGAGES.

1. Where the mortgagor is not a concurring party.
2. Where the mortgagor is a concurring party.

Right of transfer incidental to a mortgage security.—The right to transfer a mortgage, being one of the inseparable properties of a mortgage security, may be exercised by the mortgagee either with or without the mortgagor's concurrence or consent; nor will the express dissent of the latter to the transfer affect the validity of the assurance in the slightest degree. Still, it has generally been considered advisable to make the mortgagor a party, not so much with a view of conferring any additional strength to the transfer, as for the purpose of preventing questions from being raised at any future day as to what amount of money really was due from him upon the mortgage security at the time of its transfer, a mortgagor being permitted to set off any payments made by him to the mortgagee on account of the mortgage against any transferee, who without his consent takes a transfer of the mortgage security, the latter of whom, under such circumstances, must take such transfer upon the same terms as the mortgagee himself held the property: (*Ashenhurst v. James*, 3 Atk. 270; *Bradwell v. Catchpole*, 3 Swanst. 79.) And a mortgagor will be entitled to set-off payments

made as well subsequently as prior to the transfer, provided he had no notice of such transfer at the time he made such payments: (*Ngrish v. Marshall*, 5 Mad. 48.) Nor will the fact of registering a deed of transfer be sufficient to fix a mortgagor with notice: (*Williams v. Sorrell*, 4 Ves. 389.)

Mortgagee assigning mortgage without mortgagor's concurrence, when bound to account for rents and profits.—Another disadvantage of transferring a mortgage without the mortgagor's concurrence is, that a mortgagee assigning without such concurrence renders himself liable to account with the mortgagor for rents received from the tenants of the mortgaged premises, as well after as before the transfer (1 Eq. Ca. Abr. 327); for a mortgagee in possession is considered in equity in some sort as a trustee of the estate, and as such accountable for the rents and profits, so that a mortgagee who has been in the receipt of the rents and profits must be careful how he assigns his mortgage, without the mortgagor's concurrence, to any one not likely to render a proper account in these matters, and for which the mortgagee himself becomes personally liable in case he assigns the pledge to an insolvent person.

Difficulties sometimes incurred in procuring mortgagor's concurrence in transfer.—Still, circumstances sometimes occur in which it is difficult or inconvenient, and sometimes impossible, to procure the mortgagor's concurrence; as where he is an infant, or abroad, or his residence is unknown, or he is a lunatic, or his concurrence cannot be obtained without considerable delay, and the mortgagee has immediate occasion for his money; in either of which cases the mortgagor's concurrence is often dispensed with. Whenever this occurs, the transferree's solicitor ought to make every possible inquiry as to whether the whole mortgage debt is still due; and he should also give the earliest notice of the transfer to the mortgagor that circumstances will permit, so as if possible to prevent the latter from making any further payments to the mortgagee on account of such mortgage, or setting up any such payments against the claims of the transferree.

1. *Where the Mortgagor is not a concurring party.*

How transfer of mortgage should be prepared when made without the mortgagor's concurrence.—When a transfer of mortgage is made without the mortgagor's concurrence, the original mortgage ought to be recited, as also that default

has been made in payment, and the amount of principal moneys and interest then due upon the mortgage security. It is not necessary to state by whom the interest has been paid where the mortgagor himself has discharged it; but where it has been paid by third parties, or in any particular manner, or under any particular circumstances, as where it has been paid by the tenants in consequence of a notice to that effect from the mortgagee (see the form of a recital to this effect, 2 Con. Prec., Part V., Section IX., No. I., clause A., *in notis*, p. 341, 2nd edit.), or by the representatives of a deceased mortgagor, then those particular facts and circumstances should be recited: (see form of the latter recital where the interest has been paid by the mortgagor's heir, 2 Con. Prec., Part V., Section IX., No. I., clause B., *in notis*, p. 341, 2nd edit.) And in like manner, if any part of the principal has been discharged by the mortgagor's personal representatives, that fact should be recited accordingly.

Alterations effected in the law with respect to claims of mortgagor's heir or devisee to have mortgage debt discharged out of the personal estate.—If the mortgagor died before the year 1855, then his personal representatives would have been the proper persons to discharge the mortgage debt: (*Wythe v. Henneker*, 3 Myl. & Kee. 633.) Still, this rule only held where the mortgage debt was created by the mortgagor himself, and not where he acquired the property already onerated with the charge, and in this respect it made no difference whether he acquired this property as a purchaser for valuable consideration, or as a volunteer under some will or settlement, as in either case his heir or devisee must have taken the property subject to the charge, and had no right to throw the burden of the debt upon the personal estate: (*Noel v. Lord Henley*, 7 Pri. 241; Dan. 322.) But the act 17 & 18 Vict. c. 113, has abolished all distinctions in this respect with regard to persons dying after the year 1854, the heir or devisee being in both cases equally precluded from making any claim on the personal assets for payment of the mortgage debt (sect. 1); but this act is not to affect the rights of any persons claiming under any will, deed, or other documents made before the first day of January, 1855: (*ib.*)

Law as to wills, &c., made subsequently to 1855.—And even as to wills, deeds, and documents made subsequently to 1855, there is nothing in the act to prevent a mortgagor, if he pleases, from making his personal estate the primary

fund for the discharge of his mortgage debts; for the act depriving the heir and devisee of these rights only applies to those cases where the mortgagor shall not have signified a contrary or other intention. If, therefore, he does signify such contrary or other intention, that intention will be allowed to prevail; if he does not do so, then his heir or devisee must take the mortgaged premises subject to the charge.

Where the mortgagor has left an infant heir.—If the reason for not making the mortgagor a party arises from the circumstance of the original mortgagor having died leaving an infant heir on whom the equity of redemption has descended, it may be proper to recite that fact, and, in doing this, it will be proper to state how and in what way the equity of redemption has descended, and whether in consequence of the ancestor's intestacy, or, in case of his having made a will, from his having made no disposition of his equity of redemption in the mortgaged premises: (see the form 2 Con. Prec., Part V., Section IX., No. I., clause B., p. 341, *in notis*, 2nd edit.)

Assignment of mortgage debt.—The mortgage debt should always be assigned whenever the mortgagor is not a concurring party to the transfer, accompanied by a power of attorney authorizing the transferee to sue for the mortgage debt, and give discharges for the same in the mortgagee's name: (see the form 2 Con. Prec., Part V., Section II., No. XVIII., clauses 5, 6, and 7, pp. 129, 130, 2nd edit.)

Conveyance of mortgaged premises.—The mortgagor then conveys the mortgaged premises to the mortgagee, subject to the subsisting equity of redemption (see the form 2 Con. Prec., Part II., Section II., No. XVIII., clauses 8 and 9, p. 131, 2nd edit.); and where the original mortgage contains a power of sale, should be added as follows:

"But subject to the powers of sale, and all other the powers and authorities, trusts, intents and purposes in the said recited indenture of mortgage expressed and contained, as are now subsisting; and that as fully and effectually to all intents and purposes as the said (*original mortgagee*), his heirs, executors, administrators or assigns, could or might have exercised the same."

Assignment of mortgage debt and conveyance of mortgaged premises may be both contained in same clause.—If brevity is desirable, the assignment of the mortgage debt, and the con-

veyance or assignment of the mortgaged premises, may be both contained in the same testatum clause (see the form 2 Con. Prec., Part V., Section IX., No. IV., clause 4, pp. 353, 354, 2nd edit.); but the habendum limiting the mortgage debt and the mortgaged premises to the transferee, ought to form two distinct and separate clauses: (see the forms *ut ib.*, clauses 5 & 6, pp. 354, 355, 2nd edit.)

Where the transfer is made in consideration of a lesser sum than is advanced on the original mortgage.—It has occasionally happened that a mortgagee has advanced money upon a security which, either at the time of the mortgage, or afterwards, proves of inefficient value to realize the mortgage debt, in which case a mortgagee, wishing to get what he can out of the property, has sometimes been content to make a transfer of the mortgage for a lesser sum than he originally advanced upon the security, and this more particularly in a case where the mortgage deed has not contained a power of sale, and the mortgagee has been unwilling to incur the delay, trouble, and expense of a foreclosure suit. It must, however, be borne in mind, that transactions of this nature, although they assume the form of transfers of mortgage, are nevertheless viewed in the eye of the law as actual purchases, and the deed of transfer must be impressed with an *ad valorem* stamp adapted to a purchase for the amount of the consideration money given for the transfer.

Form of assurance, how prepared.—The deed of transfer should recite the mortgage, the default in payment, that principal moneys, with an arrear of interest, still remain due upon the security, and the terms which form the consideration of the transfer (see the form 2 Con. Prec., Part V., No. IX., clauses 1 to 4 inclusive, p. 377, 2nd edit.); the mortgagee should then assign the mortgage debt, and arrears of interest, with power of attorney to sue for and give discharges for the same; and also convey or assign the mortgaged premises, subject to the subsisting equity of redemption: (see form 2 Con. Prec., Part V., Section II., No. XVIII., clauses 5 to 9 inclusive, pp. 129–131, 2nd edit.) To this should be added covenants from the transferror that he has done no act to incumber; that he has not received the mortgage debt; and that he will not revoke the power of attorney, nor release any action that may be brought under it; concluding with a covenant from the transferee to indemnify the transferror from all costs in respect of actions, &c., prosecuted under the power of attorney: (see the form 2 Con. Prec., Part V.,

Section IX., No. I., clauses 6 to 9 inclusive, pp. 343, 344, 2nd edit.)

2. *Where the Mortgagor is a Concurring Party.*

As to the parties and recitals.—When the mortgagor is a concurring party, as he takes only an equitable estate, the mortgagee, or whoever else has the legal estate, must always be named as the first party to the deed. The mortgage is then recited, as also what amount of principal and interest is then due; but it is generally so arranged that all arrears of interest shall be paid to the mortgagee up to the time of the execution of the deed of transfer, and such payment is recited to have been made accordingly (see the form 2 Con. Prec., Part V., Section IX., No. I., clause 4, p. 341, 2nd edit.); and the agreement relating to the transfer is after this recited.

Operative parts of the transfer.—It was, until very recently, a common practice, even in those transfers of mortgage to which the mortgagor was a concurring party, to make the transfer subject to the subsisting equity of redemption and original mortgage covenants, for the purpose of preventing questions from being raised as to its being a new mortgage security, and therefore requiring to be stamped with the same *ad valorem* stamp as upon an original mortgage, instead of the 1*l.* 15*s.* common deed stamp, adapted to an ordinary transfer of mortgage. The inconvenience attending the above-mentioned mode of proceeding is, that the transferee is thereby compelled to sue for the mortgage debt in the name of the original mortgagee, whilst at the same time the mortgagor, being unprotected by the proviso for redemption, is liable to be called upon for immediate payment of his mortgage debt. But the Stamp Act (13 & 14 Vict. c. 97, s. 6) has removed all the doubts and difficulties which existed under the old system, by enacting that a transfer of mortgage made prior to the 10th day of October, 1850, shall not, by reason of its containing any further or additional security, or any new covenant, proviso, power, stipulation, or agreement, or other matter whatever, be deemed liable to any further duty (except progressive duty) than 1*l.* 15*s.*, where no further sum is added, and where any further sum is added, the same duty as on a mortgage for such further sum (sect. 9); whilst the schedule annexed to the same act, which contains a similar proviso with respect to transfers of mortgage made subsequently to the said 10th day of October, 1850, imposes

the same amount of stamp duty as on the original mortgage where no further sum is advanced and the original advance does not exceed the sum of 1,400*l.*, and where it exceeds that amount, a duty of 1*l.* 15*s.*; and where any further sum is advanced, the same duty as on a mortgage for such further sum.

Alterations in practice likely to be effected by above-mentioned act.—From the advantages the above-mentioned act has conferred, it is apprehended the mode of transferring the mortgage subject to the existing proviso for redemption and powers of sale contained in the original mortgage will soon grow out of use, and that the form containing a new proviso for redemption and fresh mortgage covenants will, from its superior advantages, be universally adopted: (see the form 2 Con. Prec., Part V., Section IX., No. II., pp. 345, 349.)

Modern form, how usually penned.—This form, where no further advance is made, differs in no other way from the ordinary form of an original mortgage, excepting that the mortgagor is made a conveying party in the operative part of the instrument, in which he acknowledges the payment by the transferee to the transferror to be made by his direction, and confirms the conveyance made by the transferror to such transferee; and the transferror covenants with the transferee that he has done no act to incumber: (see the form 2 Con. Prec., Part V., Section IX., No. II., pp. 345, 348, 2nd edit.)

Where a further advance is made.—And even, indeed, in those cases where the mortgage deed embraces a further charge in respect of a further advance, as well as a transfer of mortgage, a very slight alteration in the form of the instrument will suffice. That is to say, a recital of the request of the mortgagor to the transferee to make him the further advance in addition to paying off the original mortgage debt, should be inserted in the clause relating to the agreement for the transfer; and the receipt and payment of both mortgage debt and further charge should be acknowledged by the mortgagor in the testatum clause: (see the form 2 Con. Prec., Part V., Section IX., No. III., clauses 3 and 4, pp. 350, 351, 2nd edit.)

Where additional property is added.—Where any further property of any kind is added, either as additional security

to the original mortgage, or as an auxiliary security upon the further advance, the better plan will be to have two distinct testatum clauses, one in which the mortgagee concurs with the mortgagor in conveying the mortgaged premises, and the other by which the mortgagor alone conveys the additional property. The correct way, therefore, to prepare an instrument of this kind will be, after describing the parties, to recite the original mortgage, and the instrument under which the mortgagor holds the additional property, and the amount of principal moneys and interest then due: (see the form and directions, 2 Con. Prec., Part V., Section VIII., No. IV., clauses 1, 2, and 3, pp. 331, 332, 2nd edit.) The agreement to pay off the mortgage debt should be next recited, and the mortgagee and the mortgagor should then convey the mortgaged premises to the transferee, to hold to him in fee subject to the proviso for redemption thereafter contained: (see the form and directions, 2 Con. Prec., Part V., Section IX., No. III., clauses 3 and 4, p. 350, 2nd edit.) The further testatum and habendum by which the mortgagor conveys the additional property should then come in (see the form 2 Con. Prec., Part V., Section II., clauses 4 and 5, pp. 45, 46), and should be followed by the proviso for redemption, power of sale in default, foreclosure clause, and usual mortgage covenants as in ordinary cases.

Where a mortgage originally by demise is converted into a mortgage in fee.—It not unfrequently happens that a mortgage originally created by way of demise is, where a further advance is made upon a transfer, and sometimes without any such advance, converted into a mortgage in fee. To effect this, the mortgage by demise should be recited; next the amount of mortgage debt and of interest, if any, that is then due, and the agreement for the transfer; the mortgagee then, by the mortgagor's direction, surrenders his term, and the mortgagor conveys the fee to the transferee, to hold to him in fee subject to the proviso for redemption, followed by the other usual mortgage clauses, as before directed: (see the form 2 Con. Prec., Part V., Section IX., No. VI., p. 360, 2nd edit.)

As to transfers of mortgage of copyholds.—In mortgages of copyhold property, although it is the usual practice to surrender the premises to the copyholder's use, the admission is usually delayed in order to save expense; but when a transfer of the mortgage has been effected, the more general practice seems to be for the transferee to require the mort-

gagee to be admitted, and then to make a surrender to him; yet this mode, although often adopted, appears to impose an unnecessary expense upon the mortgagor without conferring any actual advantage to the transferee; for the entire object of the transfer may be equally as well accomplished by the mortgagor's making a fresh surrender to the transferee's use, which will vacate the former surrender, and the transferee will thus be entitled to admission in precisely the same manner as if the former surrenderee had been admitted, and had afterwards surrendered to the transferee's use.

How mortgage assurance should be penned.—The deed of transfer should recite the surrender; that default was made in payment, but that the mortgagee had not been admitted; that mortgage debt and interest (if any) is still due, and agreement for transfer. This should be followed by a memorandum of surrender, with power of appointment, with the ultimate limitation to transferee in fee: to hold at the will of the lord, or according to the custom of the manor, according to circumstances. The power of appointment is usually confined to a period of twenty-one years from the death of the survivor of the mortgagor, mortgagee, or transferee, so as to avoid all danger of infringing upon the rules against perpetuities. The proviso for redemption, and other usual mortgage clauses, are then inserted in the same order as in other deeds of transfer of mortgage: (see the form and directions, 2 Con. Prec., Part V., Section IX., No. VIII., pp. 362, 363, 2nd edit.)

Where the transfer is made by the representatives of a deceased mortgagee.—When a mortgagee dies prior to a transfer of a mortgage, his representatives must of course be the principal parties to the transfer. If the mortgage was by way of demise, or consisted of chattel property only, then his personal representatives would be the proper parties; but, if the mortgage is in fee, then both the heir and personal representatives must concur: the former for the purpose of conveying the legal estate in the mortgaged premises; the latter in order to release such premises from all claims in respect of the mortgage debt.

How transfer of mortgage by representatives of deceased mortgagee should be penned.—In penning a transfer of mortgage under the above circumstances, the mortgagee's heir must be named as the party of the first part, the personal representatives of the second part, the mortgagor of the

third part, and the transferee of the fourth part. The instrument should then recite the mortgage to the deceased mortgagee, his death, and the probate of his will; the amount of principal and interest due upon the mortgage security, and the request and agreement for loan. The operative part of the deed should state the mortgage debt to be paid to the mortgagee's personal representatives by the mortgagor's direction, and a nominal consideration should be expressed to have been paid to the heir, who by the mortgagor's direction should convey; the personal representatives should release, and the mortgagor confirm the mortgaged premises to the transferee, to hold to him in fee, subject to a proviso for redemption, and the usual mortgage clauses: (see the form 2 Con. Prec., Part V., Section IX., No. IX., pp. 370, 371, 2nd edit.) It is a common practice to make the personal representatives concur with the heir that they have done no act to incumber; but this is unnecessary where the mortgage is in fee, for the executors, taking no legal estate in the premises, have no power to incumber them. But if it should so happen that the mortgage is of a chattel interest, or any portion of the mortgaged premises consists of the latter kind of property, then the whole legal estate in such last-mentioned property will become vested in the mortgagee's personal representatives in their representative character, and they may of course be required to covenant that they have done no act by which the property which became so vested in them can be in anywise incumbered or prejudicially affected.

Where the mortgaged premises consist both of freehold and chattel interests.—If the mortgaged premises consist both of freehold and of chattel interests, a further testatum and habendum will be required for the purpose of passing the chattel interest, in the latter of which the heirs of course are not a concurring party, the assignment of the mortgagee's estate and interest therein being made by the personal representatives only, which assignment the mortgagor should confirm. If the original mortgage was by way of assignment, then the mortgagor may assign as well as confirm, and his name should also be annexed to the all-estate clause; but if the mortgage was by way of underlease, then the mortgagor should merely confirm the assignment, and his name should, for the reasons we have already mentioned (*ante*, p. 221), be omitted in the all-estate clause: (see the form and directions, 2 Con. Prec., Part V., Section IX., No. IX., clause 6, p. 372, 2nd edit.)

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III. ASSIGNMENT OF BONDS.

How the assignment of a bond should be penned.—As the assignment of a bond will only pass a mere chose in action, it will be necessary to add a power of attorney to such assignment, authorizing the assignee to sue for the debt in the obligee's name, in order to enable the former to recover in an action at law. The form is a very simple one. It first sets out with the date and description of the parties; it then recites the bond, and the amount of principal and interest due thereon; after which the assignor assigns the bond and bond debt to the assignee, with power of attorney to sue in obligee's name for the debt, and to give effectual releases and discharges for the same. The assignor then enters into qualified covenants with the assignee that he has good right to assign the bond, that he will not release the debt thereby secured, or any action which may be brought for its recovery under the power of attorney, and for further assurance; concluding with a covenant from the assignee that he will indemnify the assignor from the consequences of any action brought for the recovery of the mortgage debt under the power of attorney.

Where the assignment is by trustees.—If the assignment is by trustees, executors, or administrators, who take no beneficial interest under the bond, the assigning parties in such case cannot be required to enter into any other covenants than the usual covenant required of trustees that they have done no act to incumber.

CHAPTER VIII.

OF THE REDEMPTION AND RECONVEYANCE OF MORTGAGED ESTATES.

Mortgagor in case of action brought against him for recovery of possession of mortgaged premises may, in case no foreclosure suit is depending, redeem on payment of principal, interest, and costs.—By the statute 15 & 16 Vict. c. 76, s. 219, where any action shall be brought by any mortgagee, his heirs, executors, administrators, or assignees for the recovery or possession of any mortgaged lands, tenements, or hereditaments, and no suit shall be then depending in any of Her Majesty's courts of equity in that part of Great Britain called England, for or touching the foreclosing of such mortgaged lands, tenements, or hereditaments, if the person having right to redeem such mortgaged lands, tenements, or hereditaments, and who shall appear and become defendant in such action, shall at any time pending such action pay unto such mortgagee, or, in case of his refusal, shall bring into court where such action shall be depending, all the principal moneys and interest due on such mortgage, and also all such costs as shall have been expended in any suit at law or in equity upon such mortgage, such money for principal, interest, and costs, to be ascertained and computed by the court where such action is or shall be depending, or by the proper officer to be appointed by such court for that purpose, the moneys so paid to such mortgagee, or brought into such court, shall be deemed and taken to be in full satisfaction and discharge of such mortgage, and the court shall and may discharge every such mortgagor or defendant of and from the same accordingly; and shall and may by rule of the same court compel such mortgagee, at the costs and charges of such mortgagor, to assign, surrender, or reconvey such mortgaged lands, tenements, and hereditaments, and such estate and interest as such mortgagee has therein, and deliver up all deeds, evidences, and writings in his custody relating to the title of such mortgaged lands,

tenements, and hereditaments, unto such mortgagor who shall have paid or brought such moneys into the court, his heirs, executors, or administrators, or to such other person or persons as he or they shall for that purpose nominate or appoint.

Act not to preclude mortgagee from insisting that mortgagor has no right to redeem, or that other moneys are due, or where the right to redeem is disputed under any subsequent incumbrance.]—But nothing herein contained shall extend to any case where the person against whom the redemption is or shall be prayed, shall (by writing under his hand, or the hand of his attorney, agent, or solicitor, to be delivered, before the money shall be brought into such court of law, to the attorney or solicitor for the other side) insist either that the party praying a redemption has not a right to redeem, or that the premises are chargeable with other or different sums than what appear on the face of the mortgage, or shall be admitted on the other side; or to any case where the right of redemption to the mortgaged lands and premises in question in any cause or suit shall be controverted or questioned by and between different defendants in the same cause or suit, or shall prejudice any subsequent incumbrance.

Mortgagor's right to redeem independently of the above-mentioned act.]—But, independently of the above-mentioned enactment, it has long since been established, that a mortgagor, until his equity of redemption has been barred by lapse of time or by foreclosure, is entitled to redeem the mortgaged premises, and compel the mortgagee to reconvey the same on payment of principal, interest, and costs: (*Stephens v. Guppy*, 1 You. & Jerv. 450.) Still, if it be stipulated by the terms of the security, that the mortgage shall not be redeemed until a certain appointed day, the mortgagor will not be entitled to redeem or call for a reconveyance before that day arrives; nor can he, even after that day has passed, compel the mortgagee to reconvey, until the latter has received a previous reasonable notice, which is now construed to mean six calendar months from the time at which such notice is given or delivered: (*Park v. Clinton*, 12 Ves. 84.)

How right of redemption may be lost.]—The right of redemption may be lost by the laches of the mortgagor; as where he suffers a long period to elapse without asserting his right; or by his being guilty of any fraud in

the course of the transaction, by which the mortgagee's interest may be perilled or prejudiced, in either of which cases the mortgagor will deprive himself of all claim to equitable relief and protection.

Mortgagor, how barred by lapse of time.—When a mortgagee has been in possession of the mortgaged premises, or there has been no written acknowledgment that the estate is held upon mortgage for a period of twenty years or upwards, it will be a complete bar to the equity of redemption (stat. 3 & 4 Will. 4, c. 27, s. 28), and no time will be now allowed (although formerly the law was otherwise) in the case of persons labouring under disabilities, as the statute above referred to expressly declares, that a mortgagor shall be barred at the end of twenty years from the time when the mortgagee took possession, or from the last written acknowledgment: (*ib.* s. 28.) But if there have been written acknowledgments, and accounts have been kept open between the mortgagor and mortgagee within that period, then mere lapse of time will form no bar to the right of redemption: (*Proctor v. Cooper*, 2 Vern. 377; *Hansard v. Hardy*, 18 Ves. 455.) And a letter written by a mortgagee in possession has been held to be a sufficient acknowledgment of the mortgagor's right to redeem to keep his equity of redemption on foot: (*Trulock v. Robley*, 12 Sim. 402.)

How the right of redemption may be lost by fraud in the mortgagor.—If a mortgagor does any act by which the interests of the mortgagee may be seriously prejudiced, he will thereby debar himself of all right of redemption; hence a mortgagor executing a second mortgage, without giving the second mortgagee notice of all the prior charges, will be deprived of all right of redemption whatever as against such second mortgagee: (stat. 4 & 5 Will. & M. c. 16; *Strafford v. Selby*, 2 Vern. 589.)

Whether an offer to pay six months' interest in advance will be considered equivalent to notice.—When the mortgagor is desirous of redeeming before the expiration of the six months notice, the mortgagee is considered in practice to be entitled to the six months' interest; and it has been stated, that an offer to pay such amount of interest in advance is equivalent to notice (2 vol. Cas. & Opin. 51); but this seems doubtful. One strong argument, however, that was formerly urged against compelling a mortgagee to enter into

an arrangement of this kind, namely, that it was usurious, certainly does not now exist (see *ante*, p. 341) ; but the question does not appear to be settled, and it is one that is not likely to arise very often, as a mortgagee will generally be content to accede to an arrangement that will give him six months' interest in advance, and at the same time afford him an opportunity of making a fresh investment of the principal, which will again produce interest from the time of such investment, and thus afford him a double amount of interest.

Mortgagor may by his own act deprive himself of the benefit of notice.]—A mortgagee may by his own acts deprive himself of the benefit of notice of the mortgagor's intention to pay off the mortgage debt. As, for example, where he makes any previous demand of payment, or takes any steps for enforcing the same ; and, in either of these cases, the mortgagor will at any time thereafter be entitled to a reconveyance upon tendering the principal moneys, interest, and costs : (*Shrapnell v. Blake*, 2 Eq. Ca. Abr. pl. 34.) Neither will a mortgagee be entitled to any previous notice where a particular day is appointed for payment by the mutual agreement of the parties : (*Austin v. Executors of Dodwell*, 1 Eq. Ca. Abr. 318, pl. 9.)

Rule with respect to notice the privilege of the mortgagee only.]—The above rule with respect to notice is the privilege of the mortgagee only, for a mortgagor is entitled to no kind of notice whatever previously to the mortgagee's instituting proceedings against him, either for the purpose of enforcing payment of the mortgage debt, or to obtain possession of the mortgaged premises (*Doe v. Giles*, 5 Bing. 421), unless the mortgage deed itself contains some express stipulation to the contrary : (*Keech v. Hall*, Doug. 34.)

As to the tacking of incumbrances.]—Neither will a mortgagor, even in the absence of any laches or fraud on his part, be at all times entitled to redeem upon payment of the principal moneys and interest mentioned in the mortgage deed ; for if he be indebted to the mortgagee in any other sums which would create a lien on the mortgaged premises, he will not be allowed to redeem the mortgage without satisfying the other charges also : (*Trebourg v. Lord Pomfret*, cited, Amb. 733), nor does the recent statute of the 15 & 16 Vict. c. 76, prevent a mortgagee from setting up such other charges, but expressly authorizes him to insist that the mortgaged premises are chargeable with other or different

sums than what appear upon the mortgage. Upon this ground, therefore, where several estates are mortgaged by the same mortgagor to the same mortgagee, the former cannot call upon the latter to allow him to redeem the one without the other, notwithstanding the mortgages may have been made at separate times, and to secure distinct debts (*Shuttleworth v. Laycock*, 1 Vern. 246; *Willie v. Lugg*, 2 Eden. 78), and the mortgaged property may be of various kinds and descriptions, as where part is freehold, part leasehold, and part copyhold, or the like: (*Jones v. Smith*, 2 Ves. 276; 6 *ib.* 229.) But the above rule will only hold where both the mortgages are redeemable, and consequently does not apply to cases where one mortgage is redeemable, and the time for redeeming the other has not yet arrived. Neither will the above rule be allowed to prevail so as to prejudice the interests of third parties; as where A. and B. mortgage an estate to C., and either A. or B. afterwards mortgages a distinct estate to C. for a different debt, this will not prevent them from redeeming the first mortgage without redeeming the separate mortgage also. And if a mortgagee of several mortgages assigns any one of them, the rule above laid down will no longer be applicable, as the mortgagee would by his own act have rendered the case analogous to that of mortgages by different persons. Neither will the rule apply unless the mortgagee takes a legal estate in the premises: (*Earl of Newburgh v. Morton*, 12 L. T. Rep. 482.)

As to tacking bond debts.—It was formerly held that, where a mortgagor was indebted to a mortgagee in two separate debts, one secured by bond, and the other by mortgage, the mortgagor could not redeem the mortgage without discharging the bond debt also (*Halliday v. Kirkland*, 2 Ch. Rep. 361); but it is now settled that the right to tack the bond debt cannot be insisted upon as against the mortgagor himself (*Lowthian v. Hassel*, 3 Bro. C. C. 162), or purchasers claiming under him (*Archer v. Snapp*, 2 Str. 1107), even with notice of the bond debt; nor as against purchasers for valuable consideration: (*Hamilton v. Rogers*, 1 Ves. 513.) But the rule as to tacking securities will apply to the heir or devisee of the mortgagor, or his devisee of the equity of redemption, the former of whom being in by descent, the estate so descending will be assets in his hands to pay bond debts, which, if due to the mortgagee, he must discharge before he will be allowed to redeem the mortgaged premises: (*Price v. Fastnege*, Ambl. 685.) And, upon the same principle, a devisee of the equity of redemption cannot, since the passing

of the statute of Fraudulent Devises (3 & 4 Will. & M. c. 13), redeem without paying both the bond and mortgage debt; because that statute makes such devise void against creditors, and then the devisee stands in precisely the same situation as the heir in case no such devise had been made: (*Challis v. Casbourn*, Eq. Ca. Abr. 325.) And where the mortgage is for a term, or other property which becomes transmissible to personal representatives, the rule will apply to the latter in like manner as to the mortgagor's heir or devisee; and such personal representatives will not be allowed to redeem without paying off both the mortgage and the bond; for the equity of redemption of the term is assets in their hands: (*Eccles v. Thawell*, Pre. Cha. 18.) And it will be immaterial in either of the above cases whether the bond preceded the mortgage, or *vice versâ*.

Right of tacking as against mortgagor's representatives does not apply to their assignees, or to mesne incumbrancers.—The right of tacking securities, as against the mortgagor's heir, devisee, or personal representatives, does not affect the assignees of either of these parties, who will be entitled to redeem the mortgaged premises upon discharging the mortgage debt: (*Vandergoe v. Willis*, 3 Bro. C. C. 20.) Neither will this right of tacking be allowed to operate to the prejudice of mesne incumbrancers, whether by mortgage judgment, or statute staple; for the bond creditor has not the same equity against a puisne incumbrancer as against an heir-at-law: (*Corbet v. Powis*, 2 Atk. 556.)

Tacking as against representatives only applicable to debts they are bound to discharge in their representative capacity.—It must also be borne in mind that a mortgagee can only tack against the mortgagor's representatives such debts as they are bound to discharge in their representative character; hence, before copyhold estates were made assets for the payment of bond debts, a mortgagee could not have tacked against the representatives of copyholders (*Cannon v. Pack*, 2 Eq. Ca. Abr. 226, pl. 6), nor in the case of a bond in which the heirs were not bound by name, much less where the claim was in respect only of a simple contract debt (*Newby v. Cooper*, Finch, 739), unless the mortgagor was a trader within the operation of the statute (47 Geo. 3, c. 74), by which his real estate became bound by his simple contract debts. But now, by statute 3 & 4 Will. 4, c. 104, a debt by simple contract may in all cases be tacked as against the heir or devisee of real estates (including copyholds) which

are not charged with the payment of debts; and debts charged by will upon real estate may of course be tacked by virtue of the charge.

Course of proceeding to be adopted by a mortgagor desirous of redeeming.—When a mortgagor is desirous of redeeming his mortgage, he should cause the mortgage to be served with six months' previous notice in writing, which notice should be plain, positive, and explicit in its terms, so that it cannot possibly be construed as a mere proposal or treaty. It should be dated as on the day on which it was given, should be signed by the mortgagor or his lawfully authorized agent, and be addressed to the mortgagee.

Often advisable to appoint place and time of payment.—It may often also be advisable to appoint the place as also the hour of the day at which the mortgage money is to be paid; for if no place be mentioned for such payment, the mortgagor is bound to seek out the mortgagee and make a personal tender to him, unless he should be out of the kingdom (*Lansdowne v. Lansdowne*, 2 Bligh, 95), which might cause great inconvenience; as a mortgagee is not bound to reconvey until the mortgage money is actually paid into his hands, or a valid tender has been made to him; for a payment into court is insufficient (*Postlethwaite v. Blythe*, 3 Mad. 242), and unless the payment or tender be made on the precise day on which the notice expires, the mortgagee will be entitled to a fresh six months' notice: (*Hix v. Long*, 5 Vin. Abr. *sup.* p. 261.) But if a place is named for making the tender, it will then be sufficient to tender the money at that place, and if the time as well as place be specified, as for example, between the hours of twelve and two in the afternoon, it will then be sufficient to attend at the appointed place at those hours only: (Co. Litt. 312 a.)

Mortgagee will be deprived of claim for interest from time of legal tender.—If the tender is properly made, and the mortgagee refuses to accept it, he will be deprived of all claim to interest from that time (*Manning v. Burgess*, 1 Cha. Cas. 29), unless the title to the equity of redemption is disputed, or it is doubtful to whom it belongs: (*Sharpnell v. Blake*, 2 Eq. Ca. Abr. 303, pl. 34.)

Course of proceeding by mortgagor's solicitor.—Before the six months term expires, the mortgagor's solicitor should prepare the draft of reconveyance, and forward a fair copy

thereof to the mortgagee or his solicitor for his approval, in sufficient time before the period appointed for payment to allow a fair and reasonable time for its perusal.

Mortgagor is entitled to have title deeds redelivered on payment of principal, interest, and costs.]—Notwithstanding that a mortgagor has no right to call for a reconveyance without previously forwarding a draft of the intended instrument to the mortgagee or his solicitor, and allowing the latter a reasonable time to ascertain the nature of the intended assurance, a mortgagor may require all the title deeds relating to the mortgaged property to be delivered up to him immediately on payment of his principal, interest, and costs; and the mortgagee will be personally responsible for the loss of any such deeds, whilst in his custody (*Brown v. Lewell*, 22 L. J. Rep. 32); but until such payment, a mortgagor will not, as we have previously remarked, be entitled to have such deeds produced to him, or even at his own expense to be supplied with an abstract of them.

As to mortgagee's costs.]—In a recent case a bill of costs for procuring the loan, and preparing the mortgage security, made out by a firm of solicitors, one of whom advanced the money to the mortgagor, is not a charge upon the mortgaged premises, as mortgagee's costs; and the mortgagee was consequently ordered to reconvey the premises and deliver up the title deeds, and to pay the costs of the claim incurred subsequently to the date of the payment of the costs: (*Gregg v. Slater*, 21 L. T. Rep. 319.)

Steps to be taken by mortgagor's solicitor after approval of draft of reconveyance.]—On receiving back the draft of reconveyance approved by the mortgagee or his solicitor, the solicitor of the mortgagor should proceed to engross the deed, and give the mortgagee notice that such deed will be ready for execution on the day mentioned in the notice, and care must be taken that the deed is ready accordingly.

Directions for preparing deed of reconveyance.]—In an ordinary reconveyance of mortgaged premises, when the assurance is simply in fee, the proper parties are the mortgagee of the one part, and the mortgagor of the other part; the mortgage deed is then recited, and also the amount of principal and interest then owing upon the mortgage security, and the agreement to reconvey: the mortgagee in consideration of the mortgage debt being paid him then recon-

veys the mortgaged premises unto and to the use of the mortgagor, his heirs and assigns for ever (see the form 2 Con. Prec. Part V., Sect. X., No. I., pp. 380, 382, 2nd edit.), concluding with a covenant from the mortgagee that he has done no act to encumber.

Where the assurance is to uses to bar dower.]—But if the reconveyance is to be to uses to bar dower, the intervention of a trustee will be required, who should be named as the party of the third part, and the reconveyance must be made to such trustee, and the dower uses limited to arise out of his seisin : (see the form 2 Con. Prec. Part V., Sect. X., No. I., pp. 380, 382, 2nd edit.)

Where the mortgage was by demise.]—If the mortgage was by way of demise for a term of years, then the mortgage deed creating the term should be recited, as also the amount of money due upon the mortgage security, and the agreement for the redemption of the mortgage, which the mortgagee should then surrender up to the mortgagor for the purpose of merging the term in the fee simple and inheritance of the mortgaged premises, concluding with a covenant from the mortgagee that he has done no act to encumber : (see the form 2 Con. Prec., Part V., Sect. X., No. II., pp. 383, 384, 2nd edit.)

Surrender of term not actually necessary upon paying off mortgage debt upon a mortgage by demise.]—It appears, however, that a deed of surrender is not now actually necessary to annihilate the term in order to redeem a mortgage by demise, where a mortgage debt is really and *bonâ fide* paid off; for the statute (8 & 9 Vict. c. 112) expressly enacts that every term then subsisting or hereafter to be created, and becoming satisfied after the 31st day of December, 1845, shall immediately thereupon cease and determine; so that it necessarily follows, by the express words of this act, that satisfaction of the mortgage debt will be a satisfaction of the term created to secure its payment, which term will thereupon determine and become merged in the inheritance, in the same manner as if an actual surrender had really been made; and hence a simple acknowledgment of the receipt of the mortgage money signed by the mortgagee, and indorsed upon the mortgage deed, will be perfectly safe, and afford conclusive proof of the surrender of the term.

As to redemption of mortgages under benefit building

society acts.].—Reconveyances of mortgaged property, as well in fee as otherwise, may, in pursuance of the act for the regulation of building societies (6 & 7 Will. 4, c. 32), be effected by a simple acknowledgment of the receipt of the mortgage money indorsed upon the mortgage deed, as effectually as by an actual reconveyance by deed, it being by the above-mentioned act expressly enacted that it shall be lawful for the trustees named in any mortgage made on behalf of such societies, or the survivors or survivor of them, or the trustees for the time being, to indorse upon any mortgage or further charge, given by any member of such society to the trustees thereof for moneys advanced by such society to any member thereof, a receipt of all moneys intended to be secured by such mortgage or further charge, which shall be sufficient to vacate the same, and to vest the estate of and in the property comprised in such security in the person or persons for the time being entitled to the equity of redemption, without it being necessary for the trustees of any such society to give any reconveyance of the property so mortgaged; which receipt shall be specified in a schedule annexed to the rules of the said society, duly certified and deposited as aforesaid: (see the form 2 Con. Prec., Part V., Sect. X., No. IX., p. 403, 2nd edit.)

Where a portion of the mortgaged premises only are reconveyed, the residue having been previously disposed of.].—It sometimes happens that some portion of the mortgaged premises have been disposed of during the continuance of the mortgage security, either with the mortgagor's concurrence, or under the trusts or powers of sale contained in the mortgage deed, in which the mortgagor has not concurred; in either of which cases upon a reconveyance of the remaining portion of the mortgaged premises, in addition to the recital of the mortgage deed, it will be necessary to show in what manner the other part of the property has been disposed of, and also how the purchase moneys have been applied, and whether any portion, and if so how much, has been devoted to the liquidation of the mortgage debt, and what amount still remains owing upon the mortgage security. The remaining part of the mortgaged premises is then reconveyed to the mortgagor in the same manner we have just before pointed out, concluding with the same covenant from the mortgagee, that he has done no act to encumber: (see the form of this kind, 2 Con. Prec., Part V., Section X., No. III., pp. 385 to 387, 2nd edit.; *id. ib.* No. IV., pp. 388 to 390, 2nd edit.)

Where there has been a transfer of mortgage.—If there has been a transfer of mortgage it will be necessary to recite the deed of such transfer, as well as the original mortgage, after which the amount then due upon the mortgage security should be stated; the transferee of the mortgage should then reconvey the mortgaged premises to mortgagor, and the transferee must covenant that he has done no act to incumber: (see the form 2 Con. Prec., Part V., Section X., No. V., pp. 391, 392, 2nd edit.)

Where the purchase and mortgage are both contained in the same instrument.—We have already noticed that where upon a purchase part of the purchase money has been allowed to remain upon mortgage of the property, both the purchase and mortgage may be contained in the same instrument. Whenever this plan has been adopted, and the mortgaged premises are afterwards redeemed, it will be proper to recite the instrument which embraces both the above-mentioned objects, so as to show clearly the nature of the transaction, but in other respects the form of reconveyance will be the same as in the ordinary case of a reconveyance of mortgaged property: (see the form 2 Con. Prec., Part V., Section X., No. VI., p. 393, 2nd edit.)

Where the mortgage has consisted of mixed kinds of property.—If the mortgage has consisted of mixed kinds of property, the way in which such property has been limited by the mortgage deed should be recited, and the mortgaged premises must be reconveyed, or be assigned according to the nature and qualities of the various kinds of property: (see the form 2 Con. Prec., Part V., Section X., No. VII., pp. 395, 396, 2nd edit.)

Where mortgaged premises are to be reconveyed under a proviso empowering mortgagor to redeem in parcels.—When any portion of the mortgaged premises are to be redeemed in pursuance of a power reserved to the mortgagor by the mortgage deed authorizing him to redeem in parcels, the mortgage containing such power must be recited, and the power itself clearly set out, and also the terms and conditions upon which such power is to be exercised. It must then be shown by the recitals that all such terms and conditions have been strictly complied with, and afterwards the mortgaged premises may be reconveyed to the mortgagor in the manner we have before pointed out (*ante*, p. 442); but, in addition to the covenant from the mortgagee that he has done no act

to incumber, it will be necessary to insert a covenant from him to produce all such title deeds relating to the reconveyed premises as are still retained in his custody in consequence of their relating also to the title of the remaining portion of the mortgaged property: (see the form 2 Con. Prec., Part V., Section X., No. VIII., pp. 400 to 402, 2nd edit.)

Where the reconveyance is by the mortgagee's representatives.—In case of the mortgagee's death, his representatives must of course be the parties to reconvey the mortgaged premises, and if the mortgage consists of freehold estate, or of copyhold or customary lands of inheritance, both his real and personal representatives must be concurring parties; the former to convey the legal estate of the mortgaged premises, the latter to release the mortgage debt. If the deceased mortgagor has made no devise capable of passing mortgaged estates, then his heir is of course the proper party to convey; but if there is a devise capable of passing mortgage estates, then the reconveyance must be made by the devisees, and the heir becomes an unnecessary party. It will be requisite, however, that all the devisees should concur in an assurance of this nature, for having only a joint power and authority, they cannot exercise it separately (*Hudson v. Hudson*, 1 Atk. 460); and the like rule also holds with respect to administrators; but it is otherwise with respect to executors, as the latter take both a joint and a several interest in the property of their testator, so that a disposition by any one of them will be binding on all the rest: (1 Eq. Ca. Abr. 319.)

Where the mortgage is of a chattel interest.—If the mortgaged premises consist of a term of years, or of any other kind of chattel interest, real or personal, then, as the mortgagee's personal representatives are the only persons who take any transmissible interest through him in this kind of property, they are the only persons who can re-assign the same to the mortgagor upon his paying off the mortgage debt, and thus redeeming the mortgaged premises.

Mortgagor's representatives may be compelled to reconvey.—In all reconveyances of mortgaged estates the mortgagee's representatives may always be compelled to concur in an assurance for the purpose of reconveying such legal estate as may be vested in them in their representative character, either as heir, devisees, or personal representatives of the deceased mortgagee, without any reference as to whether they derive any benefit or otherwise from concurring in such

conveyance; nor will the circumstance of an heir-at-law having been disinherited by his ancestor of everything but this dry unprofitable legal estate, afford the latter any pretext or excuse for his refusal to reconvey the same to the persons entitled to the equity of redemption upon the latter paying off the mortgage debt, and thereupon claiming to redeem the mortgaged premises.

Where a mortgagee shall die without an heir, &c.—And in any case where the mortgagee, or any devisee or heir of him, shall have died without an heir, or it shall not be known who was his heir, or in case of the neglect or refusal of any such heir, devisee, or representative to convey such land for the space of twenty-eight days after a proper deed for making such conveyance shall have been tendered for his execution, the Court of Chancery is empowered to appoint any person for that purpose in the place of such heir, devisee, or representative, to convey the mortgaged premises; which conveyance is to be as effectual as if such heir, devisee, or representatives had actually executed the same: (1 Will. 4, c. 60, ss. 3 to 6; 1 & 2 Vict. c. 69.)

Where the heir is an infant.—In case the mortgagee's heir should be an infant, the Court of Chancery is authorized to make an order vesting the mortgaged lands in any person or persons the court may think proper to direct, and the order shall have the same effect as if the infant had been twenty-one years of age, and had duly executed the conveyance or assignment of the same lands in the same manner and for the same estate: (see the form 1 Con. Prec., Part I., Section II., No. XXII., pp. 126, 130, 2nd edit.)

Where the heir is a lunatic.—If the mortgagee is a lunatic, the Lord Chancellor may direct the committee to convey under the provisions of the statutes 6 Geo. 4, c. 74, 11 Geo. 4, and 1 Will. 4, c. 60.

CHAPTER VIII.

OF THE MORTGAGEE'S REMEDIES.

- I. OF THE VARIOUS KINDS OF REMEDIES A MORTGAGEE MAY RESORT TO.
- II. OF THE PRIORITY OF INCUMBRANCES, AND THE TACKING OF INCUMBRANCES AS BETWEEN PRIOR AND SUBSEQUENT MORTGAGEES.
- III. OF PROCEEDINGS BY ENTRY AND EJECTMENT.
- IV. OBTAINING RECEIPT OF THE RENTS AND PROFITS.
- V. PROCEEDINGS BY ACTION ON THE BOND OR COVENANT.
- VI. FORECLOSURE.
- VII. POWERS AND TRUSTS FOR SALE.

I. OF THE VARIOUS KINDS OF REMEDIES A MORTGAGEE MAY RESORT TO.

A MORTGAGEE is armed with various remedies for the protection and security of his interests. 1. He may obtain the actual possession of the mortgaged premises either by entry or ejectment. 2. He may get into the receipt of the rents and profits by giving notice to the tenants, the payment of which he may, after such notice, enforce by distress in the same manner as the mortgagor himself could have done. 3. He may support an action of covenant against the mortgagor for the mortgage debt and interest upon the covenant for the payment of the same contained in the mortgage deed, or an action of debt upon the mortgage bond, where any such bond has been employed as an accompanying or collateral security; and where there is a covenant to pay the interest distinct from the mortgage debt, he may maintain an action upon such covenant; and where a warrant of

attorney has been given by way of collateral security, and a judgment entered up thereon, he may proceed at once to sue out execution upon such judgment; and where the consideration for the mortgage is a transfer of stock which the mortgagor undertakes to retransfer into the mortgagee's name on some appointed day, or else to pay him an equivalent sum of money, the mortgagee may recover from the mortgagor, by action at law, a sum equivalent in value of the stock at the time of such transfer, without reference to its having fallen considerably lower at the time of trial; a subject that has already been discussed in a preceding part of the present work: (see *ante*, p. 388.) 4. He may file his bill in equity for a foreclosure: and 5, which is the most modern, and usually his best and most efficient remedy, he may, whenever the mortgage deed contains either a trust, or a power of sale, sell under such trust or power, and retain out of the purchase moneys his principal, interest, and costs, paying over the surplus moneys, if any, to the mortgagor or his representatives.

II. OF THE PRIORITY OF INCUMBRANCES, AND THE TACKING OF INCUMBRANCES AS BETWEEN PRIOR AND SUBSEQUENT MORTGAGEES.

Where there are several mortgagees of the same property, the first mortgagee in priority of time who has the legal estate will be preferred to all the rest, and then the others will follow according to their respective priorities: (*Right v. Bucknell*, 2 B. & Ad. 283.)

First mortgagee making further advances, without notice, entitled to priority over second mortgagee.—If a prior mortgagee, without notice of a subsequent mortgage, advances a further sum to the mortgagor upon a judgment or other security, he will be entitled to tack the latter securities to his mortgage, and retain against a subsequent mortgagee or other subsequent incumbrancer until both his securities are satisfied: (*Shepherd v. Titley*, 2 Atk. 352.) But although a mortgagee may tack a subsequent judgment, a judgment creditor cannot do so, because the latter has merely a lien upon the land, and no actual estate in it. Hence, if a creditor by judgment, statute, or recognizance, buys in the first mortgage, he cannot tack, because he did not lend the money on the credit of the land: (*Beavan v. Earl of Oxford*, 26 L. T. Rep. 277.) And in order to enable a mortgagee to tack his securities, he must either have the legal estate,

or the best right to call for it (*Wyndham v. Richardson*, 2 Cha. Cas. 213); and he must have no notice of the mesne incumbrance at the time he made such advance: (*Cason v. Round*, Pre. Cha. 226.) But if he had no such notice at the time of the advance, he may, by subsequently acquiring the legal estate, gain a priority over a prior incumbrance; hence a third mortgagee, who at the time he advances his money has no notice of a second mortgage, may, by obtaining a conveyance of the first mortgage, squeeze out the second mortgagee altogether, notwithstanding the third mortgagee did not obtain the conveyance until a bill had been brought by the second mortgagee to redeem the first (*Hawkins v. Taylor*, 2 Vern. 29; *Peacock v. Burt*, 13 L. J. 35); for it is by lending the money without notice that the mortgagee becomes an honest creditor and acquires the right to protect his debt. But this protection he is not compelled to look for until his debt is in danger of being prejudiced; and therefore when that danger is first discovered to him (whether it be by suit in equity or by extra-judicial means), as the honesty of his debt is not affected by the discovery, so the right of protecting that debt and the efficacy of such protection are not prejudiced: (*Belcheir v. Butler*, 1 Eden, 530.)

How right of priority may be lost.—The right of priority will be lost if the first mortgagee had notice of the mesne incumbrance, and as notice to the agent has the same effect as notice to the principal, this priority is sometimes lost by the existence of incumbrances unknown to the prior mortgagee himself, but of which some agent or solicitor he may have employed in the course of the transaction is cognizant, a circumstance which often occurs where the same solicitor is employed for both parties, which constitutes him the agent for each, so that every incumbrance created by the mortgagor of which this agent has notice will be notice to his principal, and be binding as well on mortgagee as mortgagor: (*Varney v. Carding*, 2 Sch. & Lef. 345; *Tunstall v. Trappes*, 3 Sim. 301.) And notwithstanding it appears to have been formerly considered that in order to render a notice binding it must have been in the same transaction, and that the circumstance of the same agent having been employed in the same thing by another person, or in another business which he might possibly have forgotten, would not be sufficient to charge the principal (see 1 Stor. Eq. 327, and the cases there referred to), the more recent decisions have qualified this doctrine by ruling that it will not be sufficient to prevent notice from

attaching that the transactions are distinct, where one is so closely followed by and connected with another as clearly to give rise to the presumption that the prior transaction was present in the agent's mind, and whenever this is presumed, it will be considered as constructive notice, and the principal will be bound by it accordingly: (*Hargreaves v. Rothwell*, 2 Kee. 154, 159.) But knowledge of an incumbrance by an assigning trustee will not affect a mortgagee who is unaware of it: (*Willoughby v. Willoughby*, 1 T. R. 763.)

Right of priority may be lost by fraud.—The right of priority may also be lost by fraud; hence, if a man, by the suppression of truth he was bound to communicate, or by the wilful suggestion of falsehood, be the cause of prejudice to another who had a right to a full and correct representation of the fact, his claim, in accordance with the dictates of good conscience, will be postponed to that of the person whose confidence was abused by his misrepresentation: (*Bechet v. Cordley*, 1 Bro. C. C. 351.) Hence, if A., being about to advance money to B., informs C. of his intention, and asks him at the same time whether he has any incumbrance on B.'s estate, and C. denies that he has any, whereby A. is induced to lend his money to B., and it proves that C. at the time had an existing mortgage or judgment on B.'s estate, this is fraud on the part of C., and for this his security shall be postponed to that of A. But to fix C. with the fraud, it is necessary that he should be informed of A.'s intention to lend the money; otherwise the fraudulent intention is wanting which forms the groundwork of the relief, for mere falsehood alone is insufficient for such purpose.

When priority will be gained by the possession of the title deeds.—The early doctrine seems to have been, that the possession of the title deeds by a subsequent mortgagee will give him a priority over the first mortgagee, the mere fact of possession being considered such evidence of fraud on the first mortgagee's part as of itself to postpone his security: (*Goodtitle v. Morgan*, 1 T. R. 762; *Evans v. Bicknell*, 6 Ves. 183.) But the doctrine of the present day appears to be, that the bare custody of the deeds will not necessarily give a subsequent mortgagee precedence over a prior mortgagee who has omitted to obtain them, or has let them out of his custody, unless his negligence has been so gross as to amount to fraud. In many cases, also, the non-possession of the deeds may be accounted for without any fraud on the mortgagor's part; for in some cases the mortgagor may not

be entitled to the custody of them ; as where the mortgage is only of a reversionary interest, in which case the tenants of the preceding estates will be entitled to the custody of the title deeds ; or such deeds may relate to other property of greater value, and thus the owners of that property may be entitled to their custody ; or the mortgage may be made by persons in their fiduciary character, who have other trusts to perform requiring that they should retain the deeds (*Harper v. Fielder*, 4 Mod. 129) ; or the deeds may be fraudulently obtained from the mortgagee, upon some false pretence, by a party who avails himself of their possession in effecting a mortgage of the property ; as where a mortgagee was induced to give up the possession of the deeds to a mortgagor in order, as the latter alleged, that they may be produced in evidence of his title to an intended purchaser.

Equity, although not postponing prior mortgagee, will not order deeds to be delivered to him.—But even where courts of equity will not postpone a prior mortgagee, simply on the ground of his not having the title deeds in his possession, they will not compel the person retaining such possession to deliver them up : (*Wiseman v. Westland*, 1 You. & Jerv. 117.) And if a mortgagee, at the time of entering into a mortgage, is aware that the deeds are in the hands of a third party, this is sufficient to charge him with notice, notwithstanding he may be ignorant of the fact of their being deposited as a security, since he was bound, upon the knowledge he already possessed, to make further inquiry : (*Plumb v. Fluit*, 2 Anstr. 441 ; *Birch v. Ellaines*, 2 ib. 427.)

III. OF PROCEEDINGS BY ENTRY AND EJECTMENT.

A mortgagor until default is regarded as tenant at will to the mortgagee, but after default he becomes merely a tenant by sufferance, and as such may be ejected by the mortgagee at any time, and without any previous notice whatever (*Doe v. Maisey*, 8 B. & C. 767), as may also any lessee holding under any lease granted by the mortgagor subsequent to the mortgage, and this, whether such lease be made before or after default (*Keech v. Hall*, Doug. 22) ; but the lessee will only be accountable to the mortgagee for the rents due at the time when notice of the mortgage was given him, and not then paid over to the mortgagor : (*Pope v. Biggs*, 9 B. & C. 245.)

By whom ejectment must be brought.—The party who has

the legal estate must recover in ejectment ; hence, if the legal estate is vested in a trustee, the action must be brought in his name, for, if brought in the name of the mortgagee, he must, under such circumstances, be non-suited ; and upon the same principle, if there be two several mortgages of the same lands, the mortgagee who has the legal estate will be entitled to recover in ejectment against the other mortgagee, although his mortgage be posterior in point of time : (*Goodtitle d. Norris v. Morgan*, 1 T. R. 755.) In case of the mortgagee's death, if the mortgaged premises consist of freehold estates, the action must be brought by the heir ; if of chattels, by his personal representatives.

Course of proceedings in ejectment.—For the proceedings in ejectment, the practitioner should refer to the chapter on that form of action in Paterson's *New Practice of the Common Law*, which forms a part of this series.

IV. OBTAINING RECEIPT OF THE RENTS AND PROFITS.

Course of proceeding where mortgagee is desirous to obtain receipt of rents and profits.—A mortgagee desirous of getting into the receipt of the rents and profits should give notice to the tenants to pay their rents to him, and not to pay the same to the mortgagor : (see the form 2 Con. Prec., Part V., Section XII., Nos. IX. and X., pp. 436, 437, 2nd edit.)

Where the tenants hold under a lease granted prior to the mortgage.—If the tenants hold under a lease granted prior to the mortgage, then a notice of the above kind by the mortgagee to the tenants holding under such lease, will have the same operation as an attornment at common law, and will relate back to the time of the grant, so that all the rents due from the tenants at the time of such notice, and not actually paid over to the landlord, will from thenceforth belong of right to the mortgagee, who may then distrain for them in like manner as the landlord himself might have done (stat. 4 Anne, c. 16, ss. 9 and 10 ; *Moss v. Gallimore*, 1 Doug. 279) ; and if the tenant holds only as tenant from year to year, the mortgagee may recover such rents in an action for use and occupation : (*Birch v. Wright*, 1 T. R. 378.)

Where the tenants hold under leases granted subsequently to the mortgage.—But if the tenants hold under leases granted to

them subsequent to the mortgage, then although the tenants will, after notice from the mortgagee to that effect, be justified in paying over the same to the mortgagee as against all claims of the mortgagors, still the mortgagee cannot, in case the tenants should refuse to do so, enforce such payments as rents; his proper remedy in such case being to bring ejectment against the tenants, and an action against them for the mesne profits.

Powers of distress.—In order to enable a mortgagee to distrain upon a mortgagor who is allowed to remain in possession of the mortgaged premises, a power to that effect is sometimes inserted in the mortgage deed, and the amount of interest reserved is stated to be by way of rent. But such a power will be bad, where the object and intendment of the mortgage assurance is inconsistent with the intention of creating the relation of landlord and tenant, and is not therefore adapted to mortgages under the Benefit Building Societies Act, 3 & 4 Will. 4, c. 32: (*Walker v. Giles and Fort*, 14 L. T. Rep. 41.)

Mortgagee entering into receipt of rents and profits accountable for the same.—When a mortgagee enters into the receipt of the rents and profits, he becomes accountable for the same to the mortgagor from the time he gets into such possession, and if after discharging thereout his principal and interest any surplus remains, he is bound to pay over the same to the mortgagor, and he will be chargable with interest upon any balance remaining in his hands after satisfaction of his mortgage debt, and annual rests will be decreed against him from that time, which will be directed, as well in the case of occupation rents, as on accounts of rents and profits actually received: (*Wilson v. Metcalfe*, 1 Russ. 630.)

How accounts with rests are taken.—The mode of taking account with rests is, that as soon as a mortgagee has received a sum exceeding the amount of interest, a rest should be made, and from that date the subsequent annual rests should be computed, so that if the date of the mortgage deed be in July, and the mortgagee received sums in February exceeding the interest then due, a rest should be taken in February, and annual rests be computed from that time, and not from July: (*Binnington v. Harwood*, 1 Turn. & Russ. 477.) But if the interest was considerably in arrear at the time the mortgagee entered into the receipt of the rents and profits, so that he himself has lost the interest by

delay, the court will not direct annual rests to be taken against him from the time that the amount of rents received discharged the interest due, though the rents received by him for several years afterwards greatly exceeded the interest.

Mortgagee allowed out-of-pocket expenses, but nothing for his trouble.—A mortgagee is allowed all the actual out-of-pocket expenses incurred by him in collecting the rents, but nothing for his trouble (*Leith v. Irvine*, 1 Myl. & Kee. 277), even where an express agreement to that effect has been entered into between the mortgagor and mortgagee: (*French v. Baron*, 2 Atk. 120; *Godfrey v. Watson*, 3 ib. 518.)

As to appointment of receivers.—For the reasons above mentioned it has become a common practice to appoint a receiver where the collection of the rents, on account of the distance of the property, or other circumstances, would be attended with trouble and inconvenience to the mortgagee; and it seems that where the mortgaged property is so situated that the mortgagee would employ a receiver to collect his rents, he may appoint one without any special agreement to that effect: (*Davis v. Derby*, 3 Mad. 170.) Still this doctrine cannot safely be relied on, so that unless some provision is made for the appointment in the mortgage deed, or the mortgagor will concur in such appointment, the mortgagee had better either collect the rents himself, or resort to some of his other remedies. Neither would it generally be advisable for him to apply to a court of equity to direct such an appointment, which it seems that court will never do, where the mortgagee making such application has the legal estate, but will leave him to his remedy by ejectment: (*Berney v. Sewell*, 1 Jac. & Walk. 647.) Neither, generally speaking, will the court appoint a receiver on the application of a subsequent mortgagee, but the second mortgagee must redeem the first mortgage; and it has also been held that even a charge of mismanagement or collusion will not be a sufficient ground on motion before answer to deprive or take the possession from the first mortgagee: (*Rowe v. Wood*, 2 Jac. & Walk. 553.) But if the first mortgagee is not in possession, a second mortgagee may have a receiver without prejudice to the rights of the first (*Brian v. Cormick*, 1 Cox, 422), notwithstanding the mortgagor has not appeared to the suit, and is out of the jurisdiction: (*Tanfield v. Irvine*, 2 Russ. 159.) And where a receiver has been appointed by the court, it will be contempt in the first mortgagee to proceed in ejectment without the consent of the court.

V. PROCEEDINGS BY ACTION ON THE BOND OR COVENANT.

Course of proceeding upon the mortgage bond, or upon the covenants in the mortgage deed.—A mortgagee may, as we have already noticed, bring an action at law upon the covenant for payment of principal and interest, and where a bond is also given, he may maintain an action of debt upon the bond; and if there is, as is now usual in most modern mortgage deeds, a distinct covenant for payment of interest at certain stated periods, he may also maintain an action upon such covenant or debt upon the mortgage bond, if there be such bond; and in the latter case it seems that an action upon the bond would be preferable to suing upon the covenant; for the judgment entered up for the debt on a bond will stand as a security for future breaches, and if afterwards there be such breaches, the mortgagee may have a *scire facias* on the judgment, and suggest them, and damages shall be thereupon assessed by a writ of inquiry (8 & 9 Will. 3, c. 11, s. 8), and the plaintiff will not, as in covenant, be compelled to bring fresh actions for each subsequent breach of covenant.

Writ of inquiry, how executed.—Formerly, the writ of inquiry upon a case of the above kind, as also where the plaintiff had judgment by demurrer, or by default, must have been executed before a judge at Nisi Prius (8 & 9 Will. 3, s. 8); but it must now be executed before the sheriff, and directed to him, unless the court or a judge shall otherwise order. But the court or a judge may still, where questions of difficulty are likely to arise, order the writ of inquiry to be executed before the chief justice: (*Goodman v. Morrell*, Dowl. N. S. 283.)

Proceedings at law will not deprive mortgagee of his remedies in equity.—A mortgagee will not, by proceeding against a mortgagor, be deprived of his equitable remedies, for he may if he pleases resort to all his remedies at the same time: (*Burnell v. Martin*, Doug. 417; *Schoole v. Sale*, 1 Sch. & Lef. 176.)

Generally advisable to proceed at law in the first instance.—But it has generally been deemed advisable to proceed in the first instance upon the covenant or mortgage bond by action at law, and not resort to foreclosure, until it is ascertained that the mortgagor's personal estate will prove insufficient to discharge the mortgage debt: for if the mort-

gagee should foreclose the mortgage in the first instance, and proceed afterwards by action on the covenant or mortgage bond, a court of equity would not only restrain him from proceeding with the action, but the institution of such proceedings will open the foreclosure and revive the equity of redemption: (*Booth v. Booth*, 344.) And if the mortgagee has sold the mortgaged estate, and thereby precluded himself from opening the foreclosure, equity will restrain him from suing the mortgagor for any portion of the mortgage debt, and this notwithstanding the sale shall have produced a less sum than was due upon mortgage: (*Berry v. Backer*, 8 Ves. 527; 13 *ib.* 198.)

Mortgagor discharged from payment unless mortgagee can reconvey premises and deliver up title deeds.—As a mortgagor cannot be compelled to make payment of the mortgage debt, either upon the covenant or bond, unless the mortgagee is able to reconvey the estate and deliver up the title deeds, the latter must be careful, before he institutes any such proceedings against the former, that he does not place himself in such a situation as may disable him from performing both those acts. Where a circumstance of this kind is most likely to occur is, where the mortgagee has pledged the title deeds with a third party, who refuses to deliver them up until his lien upon them has been discharged, and this the mortgagee, for want of sufficient funds in hand, may be unable to do, in which case a court of equity has granted an injunction against the proceedings at law, and ordered the title deeds to be secured; and the money paid into the bank until the title deeds were secured, and a reconveyance could be had: (*School v. Sale*, *sup.*) Another instance in which the same difficulty sometimes arose, was where a mortgagee died intestate as to his mortgage estates, and it could not be discovered who was his heir, in which case a court of equity has restrained the mortgagee's personal representatives from proceeding at law to compel payment of the money which was ordered to be paid into court until the heir could be found; but this latter inconvenience has been in a great measure remedied, if not altogether removed, by a recent statutory enactment (1 & 2 Vict. c. 69), by which the Court of Chancery is empowered to convey where the heir of the mortgagee cannot be found, or it shall not be known who was his heir, or when he shall have died without heir.

VI. FORECLOSURE.

Nature of a foreclosure bill.—Foreclosure is an original bill, which is filed by a mortgagee for the purpose of obtaining the direction of the court for payment of his principal and interest money, or, in default, that the mortgagor may be foreclosed from his equity of redemption.

As to parties to the bill.—All persons interested in the equity of redemption must be made parties to the bill; the mortgagor himself must therefore necessarily be a party, as must also his heir in case of his decease, where the mortgage consists of real estate: (*Farmer v. Curtis*, 2 Sim. 466.) But there is no necessity for making his executors or administrators parties, because the latter take no interest in the real estate (*Duncombe v. Hemsley*, 3 P. Wms. 333; *Tell v. Brown*, 2 Bro. C. C. 276); and for the same reason it would be improper to make the heir a party where the mortgage was only of a chattel interest. With respect to the mortgagee's representatives, if the mortgage was of real estate, the devisees of the mortgaged estates, if the mortgagee has made any such devise, or his heir if he has not, must be parties (*Scott v. Nicoll*, 3 Russ. 477), as must also the mortgagee's personal representatives, the latter being always necessary parties, whether the mortgage consists of real or personal property; because, whatever may be the nature of the mortgaged property, or even the mode in which the mortgage debt is made payable, the latter will belong to the personal representatives, and the heir will only hold the mortgaged premises as their trustee: (*Meeker v. Tanton*, 2 Cha. Cas. 29.) But the heir need not, and in fact ought not, to be made a party, where there is an express devise of mortgaged estates; and if the devisee does so, he will not be allowed the costs out of the estate: (*Skipp v. Wyatt*, 1 Cox, 353.)

Where mortgaged estates are in different persons.—If the estates of two different persons are both included in the same mortgage, both mortgagors must be made parties: (*Stokes v. Clindon*, 3 Swanst. 150.) So, on the other hand, if there are several mortgagees of the property, they in like manner must also be made parties. But if either of the mortgagees refuses to concur in the suit, then, it seems, if the other mortgagees file a bill alleging such refusal, the court will make a decree for foreclosure of the whole mortgage: (*Davenport v. James*, 7 Hare, 250.)

Where the mortgage is made to trustees.—Where the mortgage has been made to trustees, they ought all to be parties to a bill of foreclosure (*Wood v. Williams*, 4 Mad. 186); but where several trustees lent on mortgage the moneys of several *cestuis que trusts*, it has been held that one of the latter may file his bill of foreclosure, the trustees having refused to assist him, and being made parties in the cause: (*Montgomerie v. Marquis of Bath*, 3 Ves. 360.)

Bankrupts and insolvents not necessary parties.—If a mortgagor has become bankrupt (*Lloyd v. Lander*, 5 Mad. 282) or insolvent (*Collins v. Shirley*, 1 Russ. & M. 638), he is not a necessary party, and this, it seems, notwithstanding his assignees disclaim all interest in the equity of redemption: (*ibid.*) But judgment creditors, whose judgments had been entered up subsequent to the plaintiff's security, have been considered necessary parties; so that it will be insufficient to serve them with a copy of the bill under the 23rd Order, August, 1841: (*Adams v. Paynter*, 1 Coll. N. C. 530.)

Where the mortgage is of entailed property.—In mortgages of entailed property, if the mortgagor is tenant in tail in possession under an unprotected settlement, there is no occasion for making the remainder-man a party, as a decree of foreclosure would in that case be binding on the remainder-man or reversioner: (*Roscarrick v. Barton*, 1 Cha. Cas. 220.) But if there is an express estate for life, or if, in the case of an estate tail, there is a protector to the settlement, then it will be necessary, it seems, to make the person entitled to the first estate in remainder a party: (*Sutton v. Stone*, 1 Atk. 101.)

Where there are several derivative estates.—If there are several derivative mortgagees, they must all be made parties to a foreclosure bill, in order to prevent a multiplicity of suits. Thus, for example, where A. made a mortgage for a term of 500 years for securing 350*l.* and interest to B., who, so long before as 1705, assigned the term to C., redeemable by himself on payment of 300*l.*, B. died, C. brought a bill against A. to redeem or to be foreclosed; and, though but a derivative mortgagee, yet he did not make the representatives of B., the original mortgagee, parties, and the court held that there was, in consequence, a want of proper parties, for that B. had clearly a right to redeem C., and therefore his representatives ought to have been before the court in order to prevent another account of what was due on the original mortgage: (*Hill v. Price*, Dick. 344.)

Proceedings, how conducted.—The proceedings upon a bill of foreclosure are conducted in the usual way, and, upon the cause being heard, a decree is made directing an account of principal and interest, and for the taxation of the mortgagee's costs: (Ayck. 214, 5th edit.)

Usual course of procedure on a bill of foreclosure.—The usual practice on a bill of foreclosure was to pray either a foreclosure or a sale; but formerly a decree of foreclosure could not have been pronounced until the priorities *inter se* of all incumbrances subsequent to the plaintiff had been ascertained, the effect of which was, the plaintiff's remedy was delayed by the necessity of settling rights between the defendants: (Ayck. 214, 5th edit.); to remedy which it is by the stat. 15 & 16 Vict. enacted, that it shall be lawful for any court, in any suit for the foreclosure of an equity of redemption of any mortgaged property, upon the request of the mortgagee, or any subsequent incumbrancer, or of the mortgagor, or of any person claiming under them respectively, to direct a sale of such property instead of a foreclosure of such equity of redemption, on such terms as the court may think fit to direct, without previously determining the priorities of incumbrances, or giving the usual or any time to redeem; provided, that if such request shall be made by any subsequent incumbrancers, or by the mortgagor, or any person claiming under them respectively, the court shall not direct any such sale without the consent of the mortgagee or persons claiming under him, unless the party making such request shall deposit in court a reasonable sum of money, to be fixed on by the court, for securing the performance of such terms as the court may think fit to impose on the party making such request (s. 48), which must be such as will, upon a rough estimate, meet all possible expenses of an abortive sale: (*Bellamy v. Cockle*, 2 Eq. Rep. 435.)

How and when application for sale should be made.—The application for the sale should be made at the hearing; for if the decree be made for a foreclosure, it cannot afterwards (except under very particular circumstances), on motion, be converted into a decree for a sale: (*Girdlestone v. Lavender*, 9 Hare, App. 53.) It certainly has been done in a suit by first mortgagee, where a sale was applied for by the mortgagor and concurred in by the plaintiff, although opposed by a subsequent incumbrancer (*Laslett v. Cliff*, 23 L. T. Rep. 167); but a similar application made by a second mortgagee, opposed by the first mortgagee, was refused; and it seems,

that under the above-mentioned section of 15 & 16 Vict. c. 86, a sale instead of a foreclosure will not generally be ordered, unless there is such a complication that the common decree cannot be conveniently worked: (Ayck. 215, 5th edit.) And it seems that where the mortgage is only for a term, equity would not decree a sale without the consent of the reversioners; and, in case any of the latter were infants, a reference would be directed in order to ascertain whether or not a sale would be for their benefit: (*Foster v. Eddy*, 12 L. T. Rep. 531.)

Foreclosure will not be decreed until time for payment of principal and interest be passed.—A foreclosure will never be decreed until the period for payment of principal and interest be passed, and the mortgaged premises, in consequence thereof, forfeited to the mortgagee, as that would be to alter the nature of the contract: (*Bonham v. Newcombe*, 2 Ventr. 365.)

Mortgagee cannot foreclose as to part only of mortgaged premises.—Nor will a mortgagee be permitted to foreclose a portion only of the mortgaged premises, notwithstanding part of the mortgage money may have been advanced partly by himself and partly by another person: (*Montgomery v. Bath*, 3 Ves. 560.)

Where the equity of redemption belongs to an infant.—Where the equity of redemption belongs to an infant, the practice has been to decree a foreclosure against him, giving him a day to show cause against the decree after he comes of age: (*Price v. Carver*, 3 M. & C. 157.) But the only cause he can show is error in the decree; for he will neither be permitted to unravel the accounts, or to redeem the mortgage.

Where the equity of redemption belongs to a married woman.—And where the equity of redemption belongs to a married woman, upon a bill of foreclosure being brought against her and her husband, and a decree of foreclosure pronounced thereupon, and such decree being made absolute, the wife will be absolutely foreclosed thereby, and will not be allowed to show cause against it after her husband's death: (*Mallack v. Galton*, 3 P. Wms. 352.)

Inquiry, how conducted.—The inquiry in pursuance of the decree is now prosecuted before the clerk in judge's cham-

bers, according to the modern rules of practice (instead of being referred to the Master, as was formerly done), and the plaintiff taxes his costs, and thereupon the clerk makes his report, and certifies the amount due: (Ayck. 216, 5th edit.)

Course to be pursued when time of payment arrives.—When the time appointed for payment arrives, the mortgagee must either attend personally himself at the time and place appointed to receive the money, or, if unable to attend personally, he must authorize some person, by power of attorney, to receive the money for him (see the form, Ayck. vol. 2), and the mortgagee or his attorney, as the case may be, must remain there until the stated time expires. If the money be then paid, the plaintiff is entitled on motion, as of course, upon the production of an affidavit of due attendance and of nonpayment of the money (see the form, Ayck. vol. 2), to an order that the defendant may be absolutely foreclosed from all equity of redemption: (1 Ayck. 216, 5th edit.) This order need not be served: (*ib.*)

Court will enlarge time for payment, upon a fit case being made out.—The court will enlarge the time for payment upon a fit case being made out (*Edwards v. Cunliffe*, 1 Mad. 287), nor will even the enrolment of an absolute order for foreclosure be an impediment to enlarge the time for payment; and whatever doubts may have formerly existed, it is now settled that a vice-chancellor has jurisdiction for this purpose: (*Thornhill v. Manning*, 1 Sim. N. S. 451.) Still, the order is by no means of course, and it may be refused where no excuse is made for the default, and the security does not appear to be ample: (*Eyre v. Harrison*, 2 Beav. 478.) And whenever such period of payment is enlarged, it will be on the condition of paying the interest and costs already reported due: (*Geldard v. Hornby*, 1 Hare, 251.)

Course of proceeding to obtain order.—To obtain an order for enlargement of time, a motion must be served by defendant on the opposite party (see the form, Ayck. vol. 2, 5th edit.), supported by an affidavit of merits; and, if the order is granted, it directs interest to be computed, and taxation of the subsequent costs of the mortgagee, and extends the time accordingly: (Ayck. 217, 5th edit.)

Court may, by consent, make a decree or order for foreclosure without bringing the cause to a hearing.—The court,

upon application of the defendant having a right to redeem, and upon admission of the right and title of the plaintiff, may, before the cause is brought to a hearing, make such an order or decree as the court could have made if the cause had been regularly brought to a hearing (stat. 7 Geo. 2, c. 20), and which order may be made before answer (*Piggin v. Cheetham*, 2 Hare, 80); but this can only be done where the right of redemption is undisputed, for if such right be controverted by a different person, the court cannot make such order or decree, neither can this be done to the prejudice of subsequent mortgagees or incumbrancers; or unless all defendants interested in the equity of redemption concur in the application, and admit the plaintiff's title. Neither can a defendant who is in contempt move under the above-mentioned act: (*Hewitt v. M'Cartney*, 13 Ves. 560.) Nor can the order be granted where one of the defendants is an infant: (*Taylor v. Coates*, 3 Hare, 80.)

Disclaimer.—Where the defendant on a bill of foreclosure has no right or title in the equity of redemption he should disclaim, in which case the court will in general dismiss the bill as against him, and give him his costs, which will be added to the mortgage debt: (*Silcock v. Roynon*, 2 You. & Coll. 376.) But when there are several defendants, and some disclaim, the court will order them to be foreclosed, and will not merely dismiss the bill against them: (*Perkin v. Stafford*, 10 Sim. 562.)

As to copyholds.—In the case of copyholds, a mortgagee who is not in possession may exhibit his bill of foreclosure against a mortgagor (*Sutton v. Stone*, 2 Atk. 101), and on a decree of foreclosure, the mortgagor will be ordered to surrender to the mortgagee at his own expense: (*Hill v. Price*, Dick. 344.)

As to equitable mortgages.—It was formerly doubtful whether an equitable mortgagee upon a suit for the purpose of giving effect to his security was entitled to a decree for a sale, or only for a conveyance (*Payne v. Smith*, 2 Myl. & Kee. 417); but the practice now seems to be, to decree a conveyance (*Parker v. Housefield*, 2 Myl. & Kee. 420); and Lord Cottenham, when Master of the Rolls, said that the remedy should as nearly as possible correspond to that to which legal mortgagees are entitled, and he particularly referred to the decree in *Newton v. Aldous*, stated to have been penned by Lord Eldon himself, which contained the usual direction

for taking an account of the principal and interest due as in the case of a legal mortgage, with a declaration that in default of the payment of the principal, interest, and costs by the time limited by the decree, the plaintiff would be entitled to the mortgaged premises free from all right and equity of redemption, and to have an absolute conveyance thereof accordingly: (*Ball v. Harris*, 2 Myl. & Cra. 264; and see *Millar Eq. Mort.* 62.) But if the equitable mortgagor be dead, then, it seems, the equitable mortgagee is entitled to a sale, and to have the proceeds applied in liquidation of his debt, and to stand as a creditor for the balance, if any, on the mortgagor's general assets: (*Brocklehurst v. Jessop*, 7 Sim. 438.)

As to mortgages of stock.]—In the case of mortgages of stock no foreclosure is necessary; for a mortgagee in case of default may, as we have already noticed (*ante*, p. 387), proceed forthwith to sell the stock, accounting to the mortgagor for the surplus moneys, if any, which shall remain after discharging principal, interest, and costs: (*Ex parte Dennison*, 3 Ves. 552.)

VII. POWERS AND TRUSTS FOR SALE.

Where, as is the common practice in modern mortgage assurances, the deed contains either a power or a trust for sale, the exercise of those powers or trusts is generally resorted to by a mortgagee, as affording him a more simple and expeditious means of realizing his principal and interest than he can obtain through the medium of a foreclosure suit, notwithstanding all the recent improvements that have been made in accelerating the latter course of proceedings. In fact, if the mortgage deed contains a trust for sale, the mortgagee's remedy by foreclosure is, as we have before had occasion to notice, altogether barred; for the express trust of the deed is to sell and levy the money to pay off the mortgage debt, and the adoption of any other remedies for that purpose would be contrary to the express terms of the trust.

Practical suggestions with respect to the exercise of powers or trusts for sale.]—In exercising powers or trusts of sale, a mortgagee must be careful to carry them out in accordance with the express terms by which they are created; and if any precedent acts are required to be done, such as giving six calendar months' previous notice, or any special terms whatever are prescribed, those terms ought to be strictly complied with.

Notice should always be given to mortgagor prior to offering mortgaged premises for sale.—Notice of sale should always be served on the mortgagor, and where, as is commonly the case, a mortgagee enters into a covenant to that effect, he would render himself liable to an action at the mortgagor's suit for omitting to do so. The notice should be served in the same manner as other notices, and the mortgagee should preserve a duplicate, which is particularly necessary where the terms of the power prescribe some specified notice, as six calendar months for instance; in which case the giving such notice may be considered as a condition precedent to the exercise of the power, and therefore proof of such notice may thus form an important link in the chain of the title.

Sale, how conducted.—The sale is conducted in the same manner as in ordinary transactions between vendor and purchaser; and, under ordinary powers of sale, the mortgagee can make an effectual conveyance without the mortgagor's being a concurring party therein, whose concurrence in fact he has no power to compel, notwithstanding the mortgage deed should contain an express covenant by the mortgagor to concur in any sale the mortgagee might make of the mortgaged premises (*Clay v. Sharpe*, 18 Ves. 346); and it seems that if a purchaser should refuse a specific performance on the ground of the mortgagor not being made a party, it would be decreed against him with costs: (1 *Hughes Pract. Mort.* 67.) There is, in fact, no advantage in making the mortgagor a party where the mortgagee takes an absolute power of sale under the mortgage deed; and so far from its being essential that the mortgagor should enter into covenants for title with the purchaser, the purchaser would, in the absence of his so doing, have the full benefit of the mortgagor's general covenants for title and other covenants running with the land entered into by him in the mortgage deed, but which the latter would be exonerated from altogether, upon his entering into the usual qualified covenants for title of a vendor under ordinary circumstances, which are all he could be called upon to do, if he concurred in the conveyance to the purchaser: (see the forms of conveyances by mortgagees under power of sale, 1 *Con. Prec.*, Part II., Section I., Nos. XIX. and XX., pp. 112 to 122, 2nd edit.)

Mortgagee cannot be required to enter into covenants for title.—A mortgagee, conveying under a trust or power of sale, cannot be required to enter into covenants for title; the only covenant he may be required to enter into is, that he has done no act to incumber the mortgaged premises.

As to the exercise of powers of sale by second mortgagees.]—A second mortgagee, as long as a prior mortgage of the legal estate subsists, can only exercise a power or trust for sale subject to the prior mortgage; but such second mortgagee may redeem the prior mortgage, and thus confer a good title to a purchaser in the same way as an ordinary vendor, who sells upon redeeming the mortgage, who is entitled to call upon the mortgagee to reconvey the mortgaged premises to him or any other person he may think proper to appoint.

Application of the purchase moneys.]—The moneys arising from the sale should be first applied in paying the incidental expenses of the sale; next, in liquidation of the mortgage debt; and then the surplus moneys, if any, are to be paid over to the mortgagor or his representatives. If the sale is in pursuance of a power, and consists of freehold property, or of copyhold or customary estates of inheritance, and is made in the mortgagor's lifetime, but the purchase moneys not paid until afterwards, then such money will be payable to the mortgagor's personal representatives; and if the sale does not take place until after the mortgagor's death, in such case the mortgagor's heir, or the devisee of the mortgaged premises, upon whom the equity of redemption will have descended or to whom it will have been devised, will be entitled to the surplus moneys, which must be paid to such heir or devisee accordingly. But if the property is sold under a trust for sale, as there will be a constructive conversion of the real and personal estate by the creation of the trust, the surplus moneys must be paid to the personal representatives without any reference as to the time when such trust is exercised; as it also must where the mortgaged premises consist of a chattel interest, which of course will be transmissible to the personal representatives, and upon which the heir has no kind of claim whatever.

CHAPTER IX.

STAMP DUTIES ON MORTGAGES AND BONDS, AND ALSO
UPON WARRANTS OF ATTORNEY.

- I. STAMP DUTIES UPON ORIGINAL MORTGAGES.
 - II. STAMPS UPON TRANSFERS OF MORTGAGE.
 - III. STAMPS UPON RECONVEYANCE OF MORTGAGED PREMISES.
 - IV. STAMPS UPON WARRANTS OF ATTORNEY.
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I. STAMP DUTIES UPON ORIGINAL MORTGAGES.

THE same amount of *ad valorem* duties are payable upon a bond as upon a mortgage, all which are now arranged in a graduated scale in proportion to the sum secured, commencing at a duty of 1*s.* 3*d.* on sums not exceeding 50*l.*, and so on at the same rate for every 50*l.* or fractional part of 50*l.* on sums not exceeding 300*l.*, and for sums exceeding the latter amount a duty of 2*s.* 6*d.* for every 100*l.* and fractional parts of 100*l.*

Improvement of graduated scale upon the old system.]—This graduated scale is a great improvement upon the old system, which, under an ill-arranged scale of duties, threw the heaviest burden of duty upon the smallest sums, and thus pressed hardly upon the shoulders of a class of people who were the least able to bear its weight, as may easily be perceived by the annexed table, in which the old and new duties are separately set out.

A Comparative Table of Old and New Stamp Duties on Bond, Mortgage, or Warrant of Attorney, for securing the Payment of a Definite and Certain Sum of Money.

Old Scale.	Old duty thereon.	New Scale.	New duty thereon.
	£ s. d.		s. d.
Not exceeding 50 <i>l.</i>	1 0 0	Not exceeding 50 <i>l.</i> ..	1 3
Exceeding 50 <i>l.</i> {		Exceeding 50 <i>l.</i> {	
100 {	100 <i>l.</i> 1 10 0	100 {	100 <i>l.</i> 2 6
150 {	150 2 0 0	150 {	150 3 9
200 {	200 2 0 0	200 {	200 5 0
250 {	250 3 0 0	250 {	250 6 3
300 {	300 3 0 0	300 {	300 7 6
500 {	500 4 0 0	300 <i>l.</i> and upwards,	
1,000 {	1,000 5 0 0	for every 100 <i>l.</i> ,	
2,000 {	2,000 6 0 0	and also for every	
3,000 {	3,000 7 0 0	fractional part of	
4,000 {	4,000 8 0 0	100 <i>l.</i> }	2 6
5,000 {	5,000 9 0 0		
10,000 {	10,000 12 0 0		
15,000 {	15,000 15 0 0		
20,000 {	20,000 20 0 0		
20,000	25 0 0		

Duties regulated by the amount secured.—The amount of *ad valorem* duties are regulated by the amount of principal moneys secured, without any regard to interest, the words “definite and certain sum,” as contained in the Stamp Acts, being considered to refer to the principal sum only, so that the interest, whether bygone or subsequent, is in the nature of damage for the nonpayment of the sum advanced, and does not fall within the meaning of a definite and certain sum: (*Barker v. Smart*, 7 M. & W. 50; *Foreman v. Leyes*, 5 Car. & P. 419.) And where the payment is secured by bond, the principal so secured, and not the sum inserted by way of penalty in the bond, is the sum on which the *ad valorem* duty must be charged.

Where the sum secured is of uncertain amount.—Where either a bond (*Scott v. Allsop*, 2 Pri. 20) or a mortgage (*Halse v. Peters*, 2 B. & A. 807) was given to secure an uncertain amount, a stamp adapted to the highest sum, viz., a 25*l.* stamp, would have been necessary; but now the total amount secured is uncertain and without limit, then the same shall be available as a security for such an amount

of money as the *ad valorem* stamps impressed thereon will extend to cover: (13 & 14 Vict. c. 97, schedules, BOND, MORTGAGE.)

What kinds of expenditure, although becoming a further charge on mortgaged premises, are exempt from ad valorem duty.—It is important, however, to remark here, that there are certain kinds of expenditure upon which, although in the nature of further charges, upon which no *ad valorem* duty will attach, notwithstanding the mortgaged premises are charged with the repayment, and are not to be redeemable until such charges are fully satisfied. In order to render the property liable to *ad valorem* duty on mortgages, the expenditure must be such as is not strictly incidental to a mortgage; hence, a proviso that all such sums of money as a mortgagee shall expend in the recovery of a mortgage debt, or in effecting the renewal of any leases (*Jarman v. Larder*, 2 Hodges, 186), shall be a further charge on the mortgaged premises, will be covered by an *ad valorem* stamp adapted to the sum originally advanced; for expenses of this nature are always allowed to a mortgagee without any provision whatever respecting them: (*Mereeson v. Bragg*, 8 Ad. & Ell. 620.) With respect to fire insurances, also, the General Stamp Act (55 Geo. 3, c. 184) expressly exempts sums so expended; although it is otherwise with respect to money expended in effecting or keeping up policies of assurance upon lives, which, if charged in any way upon the mortgaged premises, would have required an *ad valorem* stamp adapted to the sum to which the charge was limited, and if no limit in amount was specified, then the highest amount of duty chargeable upon a mortgage security, viz. 25*l.*, would have attached.

Ad valorem stamp, however large in amount, will not cover any principal moneys beyond the limit in amount expressed on mortgage deed.—But although, where no limit in amount is mentioned, the instrument will be available as a security for so much money as the stamp impressed upon it will extend to cover, still the converse of this rule will not prevail, so as to permit a stamp, on account of its higher amount of *ad valorem* duty, to become available to secure a sum beyond the limit in amount expressly mentioned in the mortgage deed. Such, indeed, was the law prior to the act 13 & 14 Vict. c. 97, which has not since been altered by that or by any other enactment: (*Richards v. Macclesfield*, 10 L. J. (N. S.) 329, Chan.)

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As to mortgage bonds.—Where both a mortgage and a bond are given to secure the same sum of money, the bond ought to be referred to in the mortgage, and both instruments should bear even date with each other; in which case, although, if the sum secured does not exceed 800*l.*, the bond will be charged with the same *ad valorem* duty as on a mortgage for the same amount, yet, if the sum secured exceeds the latter amount, no further duty than 1*l.* will be chargeable, without any regard as to the amount to be secured beyond that sum: (13 & 14 Vict. c. 97, schedule, Bond.) But if the mortgage bond bears a different date, the *ad valorem* duties will go on to increase proportionally to the moneys secured, in precisely the same manner as would be required in an ordinary bond to secure the same amount, and this notwithstanding the mortgage should, in point of fact, be executed simultaneously with the mortgage deed: (*Wood v. Norton*, 9 B. & C. 885.)

Instruments of further assurance.—Any deed or instrument made for the purpose of further assurance only of any property already mortgaged or charged as a security by any deed or instrument which shall have already paid the *ad valorem* duty on mortgages or bonds, and also any deed or instrument made as an additional security for any sums of money which shall have been already secured by any deed or instrument which shall have paid the *ad valorem* duty on mortgages or bonds, are made chargeable with the following duties; (that is to say,) where the total amount secured, and in respect whereof the said *ad valorem* duty shall have been paid, shall not exceed the sum of 1,400*l.*, the same duty as on a mortgage for the same amount; and in any other case, a duty of 1*l.* 15*s.*: provided always, that if any further sum shall be added to the principal money or stock already secured, such deed or instrument for further assurance, or additional or further security, either by the mortgagor or by any other person entitled to the property mortgaged by descent, devise, or bequest from such mortgagor, shall be chargeable only (exclusive of progressive duty) with the *ad valorem* duty on mortgages in respect of such further sum of money or stock, in lieu of the duty aforesaid, notwithstanding that the same deed or instrument may also contain any covenant, either by the mortgagor or by any person entitled as aforesaid, proviso, power, stipulation or agreement, or other matter whatever in relation to the money or stock already secured, or the interest or dividends thereon: (13 & 14 Vict. c. 97, schedule, Mortgage.)

Where two or more persons advance moneys in distinct sums.]

—Where two or more persons advance moneys upon mortgage, and it is expressed to be advanced in distinct shares or sums, each stated advance will be considered as forming a separate mortgage, and will require an *ad valorem* stamp proportioned to each separate amount; but if, as in the case last referred to, the whole sum is expressed to be advanced as one aggregate amount, then one *ad valorem* stamp adapted to that amount will be sufficient to cover the whole, and it will be quite immaterial whether the parties advancing it are entitled jointly, or in distinct shares: (*Reed v. Wilmot*, 7 Bing. 577.) And an indorsement on a mortgage deed declaring that part of the mortgage money belonged to the mortgagee, but that the remainder had been advanced by a third party, was held to be insufficient to render a distinct stamp necessary in respect of each sum: (*Doe d. Downe v. Goorer*, 5 L. T. Rep. 474; Tils. on Stamps, 474, 2nd edit.)

No further ad valorem duty required upon mortgage where it has been previously been paid on a warrant of attorney to secure same amount.]—Where *ad valorem* duty has been paid in respect of a warrant of attorney, if a mortgage be afterwards made by way of collateral security for securing the same sum of money, no *ad valorem* duty will be chargeable unless a further sum be added beyond what is already secured; a warrant of attorney and a bond being for these purposes considered as the same kind of assurance: (*Pierpoint v. Gower*, 4 Man. & Gr. 795.)

No further ad valorem duty payable on legal mortgage made where such has been paid on effecting equitable mortgage.]—When the *ad valorem* duty has been paid upon effecting an equitable mortgage, whether upon a written contract or by deposit of title deeds, and a regular legal conveyance of the premises is afterwards made to the mortgagee in pursuance thereof, no further *ad valorem* duty will attach on the latter assurance, but a common deed stamp will be sufficient to cover it, at whatever period of time it may happen to be made.

Where an instrument operates for any other purpose than a mortgage.]—If an instrument operates as a mortgage, and also for any other purpose, a separate stamp will attach in respect of each transaction. Hence, as sometimes happens, where part of the purchase money is allowed to remain on mortgage, and the purchase and mortgage are both com-

prised in the same deed, an *ad valorem* duty on the whole purchase money, and also upon the sum to be secured by way of mortgage, will be required. Thus, for example, if A. contracts to sell land to B. for 5,000*l.*, 2,000*l.* of which is to remain on mortgage, there must be a conveyance *ad valorem* stamp for 5,000*l.* upon the conveyance, and an *ad valorem* mortgage stamp for 2,000*l.* upon the mortgage.

Mortgage assurances which are exempt from stamp duties.]—No stamp duties are chargeable upon mortgages for raising money in pursuance of the Benefit Building Societies Act (6 & 7 Will. 4, c. 32) (*Walker v. Giles*, 13 L. T. Rep. 209; *Barnard v. Pilsworth*, 14 *ib.* 132); neither are any *ad valorem* duties payable on a mortgage of a ship, provided such mortgage be made in accordance with the form contained in the schedule annexed to the New Merchant Shipping Act (17 & 18 Vict. c. 104): (see *ante*, p. 397.) But if any special clauses are introduced into the assurance which are not in strict conformity with the form the act prescribes, it will then become liable to stamp duties.

Copyholds.]—Where copyhold or customary lands are mortgaged by means of a conditional surrender or grant, the *ad valorem* duty will be charged on the surrender or grant, or the memorandum thereof if made out of court, or on the copy of court roll of surrenders and grants made in court. But where copyholds are charged together with other property for securing one and the same sum of money, then the *ad valorem* duty will become chargeable, and the *ad valorem* stamp must be impressed upon the mortgage deed: (*Reed v. Wilmot*, 7 Bing. 577.) In addition to the *ad valorem* duties, the duties on an "ADMITTANCE" out of court, and on the "COPY OF COURT ROLL" of an admittance in court *upon sale or mortgage*, a duty varying from 1*l.* to 5*s.* was formerly chargeable, but this has been since altered to a duty of 2*s.* 6*d.* (13 & 14 Vict. c. 97), which reduction was considered a matter of propriety, having regard to the circumstances of the repeal of the lease for a year duty in conveyances of freeholds; and also that an *ad valorem* duty is payable in respect of such sale or mortgage: (Tils. on Stamps, 22, supp., 2nd edit.)

Deed of covenant to accompany conditional surrender.]—Where a deed of covenant accompanied a conditional surrender of copyholds, it would formerly have required a 1*l.* 15*s.* stamp, without any reference to the amount of the

sum secured by the mortgage; but now, any separate deed or covenant made on the sale or mortgage of any copyhold or customary estate, where the *ad valorem* duty does not exceed 10s., is charged with a duty equal the amount of such *ad valorem* duty, and where the same shall exceed 10s., then an *ad valorem* duty of 10s.: (13 & 14 Vict. c. 97, schedule, COVENANT.)

Railway, bridge, and navigation shares.—In mortgages of railway, bridge, and navigation shares, the *ad valorem* stamp, as we have before remarked (*ante*, p. 392), ought to be impressed upon the deed of defeasance, and not upon the instrument by which the shares are transferred; but the latter instrument must also be stamped with a stamp of the same amount as the *ad valorem* duty where the sum secured does not exceed 1,400*l.*, and with a 1*l.* 15*s.* stamp where it exceeds that sum.

As to duplicates or counterparts.—Duplicates or counterparts of mortgages, as in the case of purchase deeds where the stamp duties on the original instrument, exclusive of progressive duty, shall not exceed 5*s.*, are charged with the same amount of duty, including the progressive duty thereon, if any; and where the same, exclusive as aforesaid, shall amount to the sum of 5*s.* or upwards, a duty of 5*s.*, with a progressive duty of 2*s.* 6*d.*; the same amount of duty as in the original being imposed where, exclusive of progressive duty, it is less than 5*s.*; that is to say, if an instrument be chargeable with a duty of 2*s.* 6*d.*, the duplicate will be liable to a duty of 5*s.*; if the original be chargeable with a 5*s.* duty, and also with a progressive duty of 5*s.* or with any higher amount, the duty on the duplicate will be 5*s.*, and the progressive duties 2*s.* 6*d.*: (13 & 14 Vict. c. 97, schedule, DUPLICATE.) The same act provides, however, that the duplicate, before it can be made available, must be impressed with a denoting stamp to signify that the full and proper amount of duty has been paid on the original instrument; the latter requisition, so far as relates to duplicates or counterparts of leases, has been repealed by a subsequent enactment (16 & 17 Vict. c. 59, s. 12), but it still remains in force so far as relates to duplicates or counterparts of purchase or of mortgage deeds.

II. STAMPS UPON TRANSFERS OF MORTGAGE.

Stamp duties now payable upon transfers of mortgage.—Upon the transfer of any mortgage now made, where no

further sum is added to the principal moneys or stock already secured, and such principal moneys or stock do not exceed the sum of 1,400*l.*, the amount of duty is the same as on a mortgage for the total amount of such principal money or stock; and where such principal money or stock shall exceed 1,400*l.*, then a duty of 1*l.* 15*s.* And where any further sum of money or stock shall be added to the principal money or stock already secured, the same duty will become chargeable as on a mortgage for such further money or stock only. And in every other case, not thereinbefore expressly provided for, such transfer is chargeable with a duty of 1*l.* 15*s.*: (stat. 13 & 14 Vict. c. 97, schedule, MORTGAGE.)

Difficulties formerly incurred from uncertainty as to the proper stamps upon a transfer of mortgage.—Previously to the Stamp Act (13 & 14 Vict. c. 97) doubts were continually arising as to the proper stamps to be impressed upon deeds of transfers of mortgage, particularly where the deed of transfer contained any property not included in the original mortgage security, or contained any new covenants, or a fresh proviso for redemption, or any power, stipulation, agreement, or other matter; to remove all which doubts the above-mentioned statute also enacts, that any transfer of mortgage then or thereafter to be made shall not, by reason of its containing any further or additional security, or any new covenant, proviso, power, stipulation, agreement or other matter whatever, be deemed liable to any further duty (except progressive duty) than the duties we have just before mentioned; and that any deed operating as a further charge for any additional money advanced upon any property already comprised in any mortgage shall not, by reason of its containing any of the matters aforesaid in relation to the money previously secured, be liable to any further stamp duty than the duty charged upon the original mortgage for such further advance: (sect. 9.)

III. STAMPS UPON THE RECONVEYANCE OF MORTGAGED PREMISES.

Stamp duties now payable on reconveyance of mortgaged premises.—Any reconveyance, release, surrender, discharge, or renunciation of any mortgage, or of any other security as aforesaid, or of the benefit thereof, or of the money or stock thereby secured, where the total amount of the principal money or stock thereby secured shall not exceed the sum of 1,400*l.*, is chargeable with the same duty as a mort-

gage for the amount or value of the said money or stock, and, in any other case, with a duty of 1*l.* 15*s.*

Progressive duties.]—The progressive duties are chargeable in like manner as upon all other deeds and instruments chargeable under the head of mortgage.

Reconveyances under benefit building societies, how exempted from stamp duties.]—Reconveyances of property mortgaged under the Benefit Building Societies Act (6 & 7 Will. 4, c. 32), whether in fee or otherwise, may be effected by a simple endorsement of the mortgage deed, without any stamp duties becoming chargeable in respect of such reconveyance or re-investment of the mortgaged premises: (sect. 5.)

As to mortgages by demise.]—Neither, it seems, will any of the duties upon a reconveyance, surrender, discharge or renunciation attach upon a receipt endorsed on a deed of mortgage by demise, by which the mortgagee acknowledges the satisfaction of the mortgage debt, and thereby causes a cessor of the mortgage term under the provisions of the act: (8 & 9 Vict. c. 112.)

As to copyholds.]—But in the case of a re-surrender and re-admission to copyhold premises upon paying off of a mortgage, the Commissioners of Inland Revenue have decided that a 1*l.* stamp will be required upon the re-admission of the mortgagor, in addition to the stamp duties chargeable upon the reconveyance. The reasons assigned were, that the admissions mentioned are only upon a sale or mortgage, and do not therefore affect a case like the present, which is still determined by the former stamp acts: (16 L. T. 184.)

IV. STAMP DUTIES UPON WARRANTS OF ATTORNEY.

Amount of duties now chargeable upon warrants of attorney.]—Warrants of attorney given as a security for the payment of money, or the transfer of stock, are chargeable with the same duty as on a mortgage or bond for the like purpose, except where such payment or transfer shall be already secured by a bond, mortgage, or other security which shall have paid the proper *ad valorem* duty on bonds or mortgages imposed by law at the date thereof, exceeding in amount the sum of 5*s.*; and also, except where the warrant of attorney shall be given for securing any sum or sums of

money exceeding 200*l.*, for which the person giving the same shall be then in actual custody under an arrest or mesne process, or in execution; and in those excepted cases a duty of 5*s.* will be chargeable. And all warrants of attorney not otherwise charged are now charged with a duty of 1*l.* 15*s.*: (13 & 14 Vict. c. 97, schedule, WARRANT OF ATTORNEY.)

CHAPTER X.

REDEEMABLE ANNUITIES.

Of the nature of annuities generally.]—Annuities are sometimes granted as securities for moneys advanced, the grantor being authorized to redeem the charge upon repayment of the consideration, and all arrears payable in respect of the annuity. These annuities are granted either during the life of the grantor or the grantee, and may be charged either upon real estate, or other property or funds, or they may rest only upon the grantor's mere personal security. But whether an annuity be issuing out of real or personal property, or resting only on the mere personal covenant of the grantor, the personal quality of the annuity is applicable to him alone, and not to any of the remedies for securing its payment; for, with respect to its mode of transmission, it may in either case be made to possess the properties of real estate, and, if limited to a man and his heirs, will descend to his heirs instead of his executors: (*Turner v. Turner*, Ambl. 782.)

As to annuities chargeable upon real estate.]—Where an annuity is chargeable on real estate, the grantee's solicitor must ascertain that the grantor has a sufficient estate and interest in the premises to create the charge, and that the annual value of the property is sufficient to secure its payment.

How the grants of redeemable annuities are usually penned.]—Where an annuity is granted out of an estate in fee of freehold estates, the property is either conveyed to trustees to the use and intent that the grantee shall receive thereout the annuity during his lifetime, or the lifetime of the grantor, or some other stated period, payable either half-yearly, quarterly, or at some other stated times, together with such

proportional part as may accrue due between the last payment and the death of the grantee (see the form 2 Con. Prec., Part V., Section XIII., No. IV., pp. 496, 471); or the annuity is granted at once to the grantee, and a term is demised to a trustee (generally a term of ninety-nine years determinable on the grantee's decease) upon trust for securing the annuity. Powers of distress are generally inserted, although not necessary to confer that right where the annuity is created for a life or lives out of a freehold estate, because the act (43 Geo. 3, c. 28, s. 5) empowers such an annuity to be distrained for as a rent seck; but where the annuity is granted only for years, or in any case where it issues out of a chattel interest, a power of distress will be requisite to confer that right, unless the grantee has also the reversion in the property charged.

Powers of entry.—A power of entry to secure arrears of payment is also generally inserted after the power of distress, and in all cases where the grantor can confer the privilege, it is usual to provide that the possession of the grantee, under such entry, is to be without impeachment of waste; but if the grantor's right is at all questionable, the clause should be qualified by adding at the end of it "so far as the grantor is able to confer that privilege:" (see the form 2 Con. Prec., Part V., Section XIII., No. II., clause 6, p. 456, 2nd edit.)

Powers of sale.—Powers of sale are also generally added to the two former powers, by which the trustee or trustees for the grantee are authorized by sale or mortgage to raise a sufficient sum to pay all arrears of the annuity (see the form 2 Con. Prec., Part V., Section XIII., No. II., clauses 9, 10, & 11, pp. 457, 458, 2nd edit.), or absolutely to sell the property with which the annuity is charged, and invest the proceedings of such sale, and apply the interest in satisfaction of the annuity, paying over the surplus moneys, if any, to the grantor: (see the form 2 Con. Prec., Part V., Section XIII., No. IV., clauses 8 to 16 inclusive, pp. 472, 474, 2nd edit.)

Covenants.—The usual covenants entered into by the grantor of an annuity are to pay the annuity, that he has good right to charge the premises with the same, and to convey or demise such premises, as the case may be, for the purpose of securing such annuity, and also for further

assurance: (see the form 2 Con. Prec., Part V., Sect. XIII., No. II., clauses 12 to 14 inclusive, pp. 559, 560, 2nd edit.) A covenant to insure against damage by fire ought to be inserted where any considerable portion of the property charged consists of houses or other buildings likely to be injured or destroyed by fire: (see the form 2 Con. Prec., Part V., Section XIII., No. II., clause *in notis*, p. 460, 2nd edit.)

Proviso to repurchase.—The proviso for redemption or repurchase is usually in the form of a separate testatum clause, by which the grantee covenants that the grantor shall be at liberty to redeem the annuity upon certain terms therein mentioned, which terms being complied with the annuity shall cease: (see the form 2 Con. Prec., Part V., Section XIII., No. I., clause 10, p. 452.)

Where the annuity is charged on leasehold property.—With a very slight variation the same form of assurance may be adopted where the annuity is charged upon leasehold property, as when charged upon freehold estates. It will be proper, however, to recite the lease, so as to show what estate and interest the grantor actually takes in the premises: (see the form 2 Con. Prec., Part V., Section XIII., No. II., clause A. *in notis*, p. 454, 2nd edit.)

Where the annuity is chargeable upon copyholds.—Where an annuity is chargeable upon copyholds, it is a common practice for the grantor to covenant to surrender them to the grantee, with a condition for avoiding such surrender in case the grantor shall duly pay the annuity, with power of sale or mortgage in default thereof; and a declaration that the proceeds of such sale or mortgage shall be inserted, and a sufficient portion of the interest or dividends thereof applied in discharge of the annuity, the remainder to be paid over to the grantor. In addition to the usual covenant for payment of the annuity, the grantor covenants that he has good right to surrender, for peaceable enjoyment and freedom from incumbrances, and for further assurance, concluding with the usual clause empowering grantor to repurchase: (see the form 2 Con. Prec., Part V., Section XIII., No. V., pp. 477, 481.)

Where the annuity is secured upon stock.—Sometimes the payment of an annuity is secured upon life interests in stock in the funds. In assurances of this kind, it is usual to recite the

nature and extent of interest the grantor takes in the stock, and the agreement to charge the same with the annuity which is then granted to the grantee, and by a further testatum the grantor transfers his interest in the stock to a trustee, with power of attorney to receive the dividends, and with a declaration of trust to secure the annuity. The usual covenants are, that the grantor will pay the annuity, that he has good right to charge the stock, and for further assurance. The proviso for repurchase is much the same as when the annuity is chargeable upon real estate: (see the form 2 Con. Prec., Part V., Section XIII., No. III., pp. 463, 468, 2nd edit.)

Personal annuities.—A mere personal annuity is usually secured by the grantor's entering into a deed of covenant to pay the annuity, and to effect a policy of assurance upon his life, accompanied by a bond, or a warrant of attorney, by way of collateral security, and sometimes by both; but where there is a warrant of attorney, and the annuity contains a covenant for payment of the annuity the expense of a bond may be safely dispensed with, as a judgment may be entered upon the warrant of attorney, equally as well without a bond as with one. In case, however, no warrant of attorney be given, a bond affords a better security than a covenant, as the former entitles the grantee of an annuity to obtain judgment for the penalty in a single action, and to take out execution from time to time on the arrears; whereas, if he has only the grantor's covenant to rely on, he would be compelled to bring successive actions to recover the arrears as they accrue due. Another disadvantage in relying upon a covenant is, that in case of the grantor's death the annuitant would not, as against simple contract creditors, be entitled to have the assets reserved to answer future payments, as he clearly would be if the annuity had been secured by bond, which for such purpose will be treated as an actual subsisting debt.

How personal annuity should be penned.—A deed for securing a personal annuity should recite that the grantor has given the grantee his annuity bond, or executed the warrant of attorney, and if a policy of assurance has been already effected on the grantor's life, that fact should also be recited. The grantor should then enter into a covenant to pay the grantee the annuity; and the policy of assurance, if any such has been effected, should be assigned to the grantee; if not, the grantor must covenant to effect such

assurance, and to do all necessary acts required for that purpose. He must also further covenant that he will not do any act whereby the policy may be vacated, or whereby any additional premium may become payable thereon; and to repay any moneys the grantee may pay in respect thereof. A clause should then be inserted declaring that the bond or warrant of attorney (or both the latter instruments, as the case may be) are to be considered as collateral securities to secure the annuity; and that, upon satisfaction of the annuity, the grantee will acknowledge satisfaction on the record of judgment, concluding with the proviso for redemption and repurchase.

Bonds and warrants of attorney often given as collateral security, where the annuity is charged on real or personal property.—A warrant of attorney or bond, and also a policy of assurance, often accompany the grant of an annuity secured upon a life interest either in real estate or personal property (see the form 2 Con. Prec., Part V., Section XIII., No. II., clause 13, and directions therein contained, p. 460, 2nd edit.; see also observations at the end of clause 19, *ib.* No. IV., p. 475; *ib.* No. III., clause 10, p. 467; *ib.* clause 12, p. 468); and sometimes those collateral securities are given even where the annuity is to be issuing out of a freehold estate of inheritance (see directions at the end of clause 19, 2 Con. Prec., Part V., Section XIII., No. IV., p. 475, 2nd edit.), and also when secured upon a conditional surrender of copyholds: (see practical directions, 2 Con. Prec., Part V., Section XIII., No. V., clause VIII., p. 481, 2nd edit.)

As to the enrolment and registry of annuities.—The act of 53 Geo. 3, c. 141, required all annuities to be enrolled in Chancery, which act was lately repealed by the statute 17 & 18 Vict. c. 90; but by a still more recent enactment (18 Vict. c. 15), after reciting that by such repeal of the said act of 53 Geo. 3, c. 141, purchasers are no longer able to ascertain by search what life annuities or rentcharges may have been granted, enacts that any annuity or rent charge granted after the passing of this act, otherwise than by marriage settlement for one or more life or lives, or for any term of years or greater estate determinable upon one or more life or lives, shall not affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless or until a memorandum or minute containing the name and usual or last known place of abode, and the title, trade, or profession of the person whose estate is

intended to be affected thereby, and the date of the deed, bond, instrument or assurance whereby the annuity or rentcharge is granted, and the annual sums to be paid, shall be left with the senior Master of the Court of Common Pleas at Westminster, who shall forthwith enter the particulars in a book, in alphabetical order, by the name of the person whose estate is intended to be affected by the annuity or rentcharge, together with the year and day of the month when every such memorandum or minute is so left with him, and he shall be entitled, for every such entry, to the sum of 2s. 6d., and all persons shall be at liberty to search the same book, together with the other books or registers in the office, upon payment of the sum of 1s. : (sect. 12.)

Course of proceedings to register annuity.].—As soon, therefore, as the deed granting the annuity is executed, the grantee's solicitor must make out a memorandum in the form prescribed by the above act, and leave the same with the senior Master of the Common Pleas, in order that the particulars of the same may be duly entered according to the directions of the act.

Of the re-grant of annuities.].—When an annuity is redeemed, a re-grant will be necessary to release the property from the charge. The assurance for this purpose will differ very little from an ordinary reconveyance upon paying off a mortgage. The instrument should recite the grant of the annuity, and the proviso for the repurchase or redemption of the same, and that the grantor has entered into an agreement with the grantee to redeem the annuity accordingly, all arrears of the annuity having been discharged up to that time. The premises charged with the annuity are then reconveyed, or re-assigned, or surrendered according to the nature and quality thereof, to the grantor, exonerated from the charge, in the same manner as estates of the like kind would be reconveyed, re-assigned or surrendered, for the purpose of re-investing the property in a mortgagor upon his paying off the mortgage.

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